DOCUMENT RESUME

ED 262 128 UD 024 464

AUTHOR	Tomasi, Lydio F., Ed.
TITLE	In Defense of the Alien. Volume VII. Immigration Reform and Refugee Developments. Proceedings of the Center for Migration Studies Annual National Legal Conference on Immigration and Refugee Policy (7th, Washington, DC, March 29-30, 1984).
INSTITUTION	Center for Migration Studies, Inc., Staten Island, N.Y.
REPORT NO	ISBN-913256-75-1
PUB DATE	85
NOTE	169p.
AVAILABLE FROM	Center for Migration Studies of New York, Inc., 209 Flagg Place, Staten Island, NY 10304 ($14.95 copy, 20% discount 10 or more).
PUB TYPE	Collected Works - Conference Proceedings (021) -- Books (010)
EDRS PRICE	MF01 Plus Postage. PC Not Available from EDRS.
DESCRIPTORS	*Church Programs; *Federal Legislation; *Immigrants; Law Enforcement; Migrant Programs; Migrant Workers; Migration; *Public Policy; *Refugees; *Undocumented Immigrants
IDENTIFIERS	El Salvador; *Immigration Law

ABSTRACT

The proceedings of the 1984 Annual National Legal Conference on Immigration and Refugee Policy are collected in this book. Following a brief introduction, 16 papers are presented under three major headings: Immigration Legislation Reform; Immigration Legislation Practice; and Refugees: Policy and Legal Developments. The papers (and their authors) are: (1) "What is the Immigration Reform and Control Act?" (James Hoffman); (2) "The Political Parameters of H.R. 1510" (Dale Frederick Swartz); (3) "Presentation on Simpson-Mazzoli" (Richard Fajardo); (4) "Florida Coalitions and the Expansion of the H-2 Program: A Personal Witness" (Frank O'Loughlin); (5) "Rights of Immigrants Under International Laws" (Peter A. Schey); (6) "New Grounds for Undocumented Aliens Plowed by the Courts" (Maurice Roberts); (7) "Extended Detention and Detention Facilities" (Austin T. Fragomen, Jr.); (8) "Enforcing the Immigration Law: Now and After Simpson-Mazzoli" (Edwin Harwood); (9) "Shifts in Refugee Programs: Overseas Assistance vs. Domestic Admissions" (James N. Purcell, Jr.); (10) "Early Warning of Forced Migration" (Leon Gordenker); (11) "Some Reflections on the Protection of Refugees from Armed Conflict Situations" (G.J.L. Coles); (12) "Comments on the Presentations by James Purcell, Leon Gordenker and Gervaise Coles" (Dennis Gallagher and Arthur C. Helton); (13) "Church Sanctuary: Historical Roots and Contemporary Practice" (Richard H. Feen); (14) "Sanctuary: An Impasse" (David Brooks Arnold); (15) "Admission of Refugees under the Revised Immigration and Nationality Act" (Diana Zanetti); (16) "The Politics of Salvadoran Refugees" (Leonel Gomez). The conference program is appended. (KH)

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

✓ This document has been reproduced as received from the person or organization originating it.

Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL IN MICROFICHE ONLY HAS BEEN GRANTED BY

Lydio Tomasi
Center for Migration Studies N.Y.

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

ED262128

IN DEFENSE OF THE ALIEN

Volume VII

Immigration Reform and Refugee Policy Developments

Proceedings of the 1984
Annual National Legal Conference
on Immigration and Refugee Policy

EDITED BY
LYDIO F. TOMASI

1985

Center for Migration Studies
New York

CMS is an educational, non-profit institute founded in New York in 1964 committed to encourage and facilitate the study of sociodemographic, economic, historical, political, legislative and refugee movements. CMS organizes an annual national legal conference on immigration and refugee policy, the proceedings of which are published in a volume series entitled **IN DEFENSE OF THE ALIEN.** *This text represents the seventh volume of that series.*

IN DEFENSE OF THE ALIEN
Volume VII

Immigration
Reform and Refugee Policy Developments

First Edition

Copyright © 1985 by

The Center for Migration Studies of New York Inc.

209 Flagg Place
Staten Island, New York 10304

ISBN 0-913256-75-1

Library of Congress Catalog Card Number 84-045349
Printed in the United States of America

Contents

	Introduction *Lydio F. Tomasi*	vii
	PART 1 IMMIGRATION LEGISLATION REFORM	1
1	What is the Immigration Reform and Control Act? *James Hoffman*	3
2	The Political Parameters of H.R. 1510 *Dale Frederick Swartz*	8
3	Presentation on Simpson-Mazzoli *Richard Fajardo*	15
4	Florida Coalitions and the Expansion of the H-2 Program: A Personal Witness *Rev. Frank O'Loughlin*	22
	PART 2 IMMIGRATION LEGISLATION PRACTICE	31
5	Rights of Immigrants Under International Laws *Peter A. Schey*	33
6	New Grounds for Undocumented Aliens Plowed by the Courts *Maurice Roberts*	39
7	Extended Detention and Detention Facilities *Austin T. Fragomen, Jr.*	46
8	Enforcing the Immigration Law: Now and After Simpson-Mazzoli *Edwin Harwood*	51

PART 3
REFUGEES: POLICY AND LEGAL DEVELOPMENTS 61

9 Shifts in Refugee Programs: Overseas Assistance vs. Domestic Admissions
James N. Purcell, Jr. 63

10 Early Warning of Forced Migration
Leon Gordenker 68

11 Some Reflections on the Protection of Refugees from Armed Conflict Situations
G.J.L. Coles 78

12 Comments on the Presentations by James Purcell, Leon Gordenker and Gervaise Coles
Dennis Gallagher, Arthur C. Helton 122

13 Church Sancturary: Historical Roots and Contemporary Practice
Richard H. Feen 132

14 Sanctuary: An Impasse
David Brooks Arnold 140

15 Admission of Refugees under the Revised Immigration and Nationality Act
Diana Zanetti 145

16 The Politics of Salvadoran Refugees
Leonel Gomez 151

APPENDIX
Program of the CMS Seventh Annual National Legal Conference on Immigration and Refugee Policy 157

Index 161

Introduction

On May 5, 1983, the House Judiciary Committee approved by a 20-to-9 vote the Immigration Reform and Control Act, H.R. 1510. According to Congressman Mazzoli, H.R. 1510 would put an end to "the chaos which today marks U.S. immigration policy" by 1) gaining control of the borders through enhanced border law enforcement and employers sanctions; 2) by providing a controlled program of temporary foreign labor; 3) by legalizing the status of undocumented aliens, and 4) by revising asylum statutes. "Despite the fact", remarked a frustrated Congressman Mazzoli, "that this measure has been carefully studied and considered by Congress for three years, that it has been approved by the House Judiciary Committee, that it has been passed by the Senate twice and is supported by a broad constituency in this land", (*i.e.*, the Administration, organized labor, several environmental groups and most leading newspapers in this country), "H.R. 1510 has still not been cleared for floor consideration... The time to take up H.R. 1510 is now. The time for further study and examination is over".[1]

Yet, according to prominent Latino politicians and community leaders the time for study and examination of the immigration reform is not quite over.

On February 22nd, Congressman Roybal introduced a bill, H.R. 4909, as a constructive alternative Immigration Reform Act. "H.R. 4909 attempts to bridge the gap between what is equitable for all Americans", remarked Congressman Garcia, "and what needs to be done to handle our nation's immigration problems. There are no employer sanctions in this bill. There is no national ID system or expanded H-2 program. There is a workable legalization program, and a provision in the bill that would set up a national commission on immigration to review, among other things, the foreign policy aspect of immigration reform".[2] "There are no easy compromises" on immigration reform, stated Congressman Garcia. On the other hand, the legislative process, conceded Congressman Mazzoli, "assumes good-faith differences which have to be settled in good faith negotiation".

This converging process toward a compromised immigration reform is facilitated by an open dialogue and a clearer understanding of the issues involved.

In the past seven years, the CMS Annual National Legal Conference was

[1] Hon. Romano Mazzoli, "The Time for Action on Immigration Reform is Now", *Congressional Record* - Extensions of Remarks, E 1009, March 14, 1984.

[2] Robert Garcia, "In Support of H.R. 4909", *Congressional Record* - Extensions of Remarks, E932, March 12, 1984.

planned and generally has been perceived as an open forum where individual perceptions and group interests have been filtered through the best available data and the most rational policy implications.

The rationale of the program of the 1984's conference was to reduce what has been called the "gap between the intentions of policymakers and advisors in the capital and daily events in the rest of society".[3]

The long-term, development-oriented approach to restrain illegal immigration cannot disregard the short-term realities and the hard political choices required to reform American immigration law. Immigration is a subject torn by ideological contradictions and special interests. The panel of the first session includes a discussion of the key issues affecting U.S. immigration legislation reform, its implementation, and possible consequences.

While Congress ponders a proposal for sweeping changes in immigration law, federal judges have been issuing opinions and orders that are already having significant impact on immigration policy. Far-reaching changes in the constitutional rights of undocumented aliens arrested while trying to enter the country illegally have been initiated. Speakers at the second session focus on due process, recent court cases and detention.

Headlines and statistics keep documenting the waves of immigrants and refugees hitting the shores of the United States or orbiting in safety from country to country. Resettlement countries, faced with large demands for resettlement, asylum claims, and calls for emergency assistance are evaluating their policy. The United States set new limits on refugees and the government policy with regard to refugees has been tested by the courts and challenged by an increasing coalition of various critics. The final session addresses these major issues of concern with UNHCR and among refugee experts and advocates nationally and internationally.

Sincere thanks are due to the other members of the organizing committee of the conference: Charles B. Keely, Austin T. Fragomen, Jr., Silvano M. Tomasi and Maggie Sullivan.

We should also like to express our appreciation to the Ford Foundation, the U.S.C.C. Migration and Refugee Services and to the Exxon Corporation for their financial support for organizing this conference.

Lydio F. Tomasi
Center for Migration Studies

[3] A. Portes, "Of Borders and States: A Skeptical Note on the Legislative Control of Immigration". In *America's New Immigration Law: Origins, Rationales, and Potential Consequences*. Edited by W.A. Cornelius and R.A. Montoya, La Jolla, CA: Center for U.S.-Mexican Studies, University of California, San Diego, 1983. Pp. 17.

Part I

Immigration Legislation Reform

1

What is the Immigration Reform and Control Act?

JAMES MICHAEL HOFFMAN *

SENATOR Alan K. Simpson of Wyoming and Congressman Romano L. Mazzoli of Kentucky, co-sponsors of the *Immigration Reform and Control Act of 1984*, had been invited to open this Seventh National Legal Conference on Immigration and Refugee Policy with an apologia on behalf of their legislation pending before the Congress of the United States. Due to more pressing commitments, neither was able to be present.

A Conference of this nature, however, in which the participants seek to clarify their own knowledge of United States immigration and refugee policy, and share their own views concerning that policy with other participants of the Conference, would be incomplete at this time and place without an exposition of this major piece of legislation commonly called the "Simpson/Mazzoli" bill.

Speaking not for the United States Catholic Conference, of which I am an employee, but rather, as a person stepping back from the thousands and even millions of words spoken and written concerning this bill, I will attempt, as fairly as I can, to answer the philosophical question: what is the "Simpson/Mazzoli" bill?

To quote Maurice A. Roberts, former Chairman of the Board of Immigration Appeals, presently the Editor of *Interpreter Releases*, the most important of publications for the immigration practitioner, and a panelist to this Conference in a later session, writing in the February 27, 1984, issue of his publication, comparing the "Simpson/Mazzoli" bill to another piece of immigration reform legislation introduced by Congressman Edward R. Roybal, "In direction, philosophy and concentration, the Roybal bill presents an entirely different approach". This observation may be partially correct, but is it totally correct? The Roybal bill, H.R. 4909, indeed, takes a different direction than that taken by the Simpson/Mazzoli bill, but are the two bills truly different in philosophy, in concentration? Do we know what the philosophy, the concentration, of the Simpson/Mazzoli formulation for immigration reform and control are? Perhaps not, or better yet, we do not remember.

* U.S. Catholic Conference, Migration & Refugee Services

Everything must be taken in context. In 1981, the *Select Commission on Immigration and Refugee Policy* completed its findings after intensive hearings, accepting the viewpoints of diverse groups and individuals throughout the United States. This Commission's findings and recommendations were implicitly based upon certain fundamental premises:

1. Immigration and refugee policy in the United States, in the later 1970s, is a non-policy. It encompasses a body of statutes, regulations and refugee realities. It is inherently unfair to all individuals touched by it, including all residents and citizens of the United States of America, and all residents and citizens of the world who yearn for, or seek, to be part of this country's society. Therefore, the *status quo* must be condemned. The immigration statutes, regulations and manner of implementation must be changed;
2. The failure of the United States to have a coherent immigration and refugee policy is an abdication of one of the basic and fundamental responsibilities of a sovereign state: to determine who can enter and remain in this country;
3. The failure to exercise control over immigration during the past decade and a half has been a tacit invitation to the people of the world to create a vast, uncounted though large, undocumented and underground society which both victimizes and is victim to the present reality. It victimizes those members of American society who are least capable to raising objections to the added competition for low-cost housing and low-paying jobs, and it victimizes those employers who are law-abiding, and respect the labor laws regarding wages and working conditions. It is victim in that its members are separated from family, are forced to live in fear of apprehension, are unable to avail themselves of the protections of our law.

THE SIMPSON/MAZZOLI RESPONSE

In July of 1981 Attorney General William French Smith presented the Reagan Administration outline for an *Omnibus Immigration* bill, eventually introduced into Congress later that year. It was in this context that Senator Simpson and Congressman Mazzoli worked. On March 17, 1982, they introduced their own *Immigration Reform and Control Act of 1982*. Most followers of immigration legislation who had reviewed the *Omnibus* bill and compared it with the *Immigration Reform and Control Act* had to say that the Simpson/Mazzoli formulation much more closely followed the recommendations of the Select Commission.

The Simspon/Mazzoli bill concentrated on the sorry state of affairs *vis-á-vis* immigration non-policy. First, it would mandate that the United States

establish stricter enforcement over the movement of peoples across the country's porous border. There would also be better control over non-immigrants permitted to come temporarily to the United States, to prevent foreign students, visitors, and visaed temporary workers from violating the terms of their admission and joining the underground society.

Second, the Simpson/Mazzoli bill, recognizing that one of the major causes of immigration to the United States was the desire to obtain work, and that the "jobs magnet" had to be tempered by a stronger force, incorporated the long-debated and two-times passed employer sanctions as a means to lessen the draw of the jobs magnet. Using the terms that the Immigration and Naturalization Service had used in oversight hearings, the cosponsors sought to "share the pain". Not just the federal government must make a renewed commitment to the restoration of immigration control, but also, the employers must make a commitment. All members of society would gain. The federal government meets its responsibility as a sovereign state. The employers of the United States no longer have to fear disruption of production or harvests caused by Immigration and Naturalization Service raids. The citizen and legal resident employees are more assured that the workforce would not be subject to artificial increases which cause a lessening of employee bargaining power, and which hold down or depress wages in the more onerous occupations. Furthermore, thinking as would any middle-class credit-card-holding individuals, the cosponsors foresaw the creation, within three years of enactment, some "secure" system to identify eligible prospective employees, making it simple for the employer — and employee — to identify a member of the "authorized" labor force.

Third, the Simpson/Mazzoli bill, recognizing that the development of the underground society, like Topsy, "just grew" and was not in and of itself an "inherently evil" group of people, that the United States had to take responsibility for the creation of the underground society, and that the United States had to take reality into account in dealing with the individuals from foreign lands who had merely come to this country to better themselves, and to contribute to the United States society their own skills and working spirit, the bill enunciated a process referred to as legalization. The cosponsors enunicated three basic principals to guide the process that they called legalization:

1. As a nation that had used and continued to use the skills and work force of this "underground", the United States "owed it" to these contributing individuals the right to become full participants in this society;
2. Recognizing the reality that the undocumented community represents a substantial percentage of the workforce, then, in fairness to employers who in good faith hired, and depend on, these people, the United States government should not allow the only other alternative to legalization,

namely, the massive disruption of society and the workplace through raids and roundups, and should implement any immigration restraints prospectively; and

3. Facing realities, any increase in the enforcement capabilities of the Immigration and Naturalization Service would be finite and could not possibly meet the demands of total enforcement of immigration laws against both old and new immigrants. The Immigration and Naturalization Service could better utilize its limited resources by legalizing those individuals who were already a part — albeit an underground part — of United States society.

Thus, the concentration of the Simpson/Mazzoli bill was simply, to strengthen enforcement resources for the future, to involve the support of the entire workforce in its efforts to restore a legal policy of immigration, and to legalize those members of our society who previously were outside the scope of a legal policy.

THE SIMPSON/MAZZOLI PHILOSOPHY

As presented above, one would have to say that the *Immigration Reform and Control Act of 1982* does possess a basic philosophy. It may or may not be a philosophy with which the participants of this Conference agree. It is a philosophy of the "three-legged stool", a term often used by the cosponsors to describe their bill. The anchor leg of this philosophy is based upon belief in the inherent rights of a sovereign state: that each sovereign state is a self-contained unit of the world society, that the government of the sovereign state has governance and protection of its citizens as prime reason for being, that the commonwealth of its citizens supercedes the commonwealth of the world community, and that its interactions with the world community is based upon its analysis of the best interests of its populace. Taken at its extremes, this philosophical base would lead either to isolationism (no immigration into the country) or world domination (encompassing all peoples into the one sovereign state). Reality shifts the international actions of this country along a continuum between the two extremes. At the present time, immigration, in as much as it is perceived as helping the commonwealth, is allowed to occur. Simpson/Mazzoli does not seek to stop immigration. Rather, it seeks to control immigration within this philosophical belief.

The second philosophical "leg" of the Simpson/Mazzoli bill has its basis in the overall political philosophy of the United States, namely, representational democracy. The United States is a nation of laws made by the representatives of "we the people". Our elected executives are expected to delegate the authority of these laws to appointed officials. The appointed officials are expected to execute the laws in a fair and uniform manner. Thus, in that we, through our Congress, create our immigration laws, we expect the executive branch of government to enforce the laws. Simpson/Mazzoli recognizes the

need for uniform and effective enforcement of the immigration laws of the United States.

The third philosophical "leg" of the Simpson/Mazzoli bill is that of fairness and equity, compassion and forgiveness. In that the executive, for so many years, failed to administer and enforce the immigration laws of the United States as regards the entry of people to serve the needs of society, fairness and equity mandate compassion and forgiveness for those who have immigrated to the United States outside the law.

CONCLUSION

All the above having been said, does the reality of the immigration debate allow us to believe that the Simpson/Mazzoli bill is as pure as the philosophical analysis makes it? The bill is not clean and simple: it originally sought to restrict legal immigration even more so than is permitted under the current law which has been unrealistic in meeting the pressure to immigrate to this country. Though the cosponsors of the bill allege that it respects the rights of all peoples in this country, it would allow the admission of an unlimited number of temporary visaed nonimmigrant farm workers. This might be very good for the growers and for the urban users of American produce, but what of the domestic agricultural labor force? What of the small merchants in agricultural areas of the country who depend upon income from serving agricultural laborers year-round, and not just during harvest time? Are their rights to a livelihood respected? Most Americans like to consider this country as a safe haven for the oppressed and the persecuted: do the provisions of this bill as they relate to due process and asylum in line with the majority belief concerning this country?

The Simpson/Mazzoli bill is not a perfect bill. Even the cosponsors have admitted this fact. To say that the bill is imperfect is not to say that it does not have a valid philosophical base. In this Conference, other proposals, especially the Roybal bill, will be presented to you, the participants. Ask the question: do the bills differ in concentration? do they differ in basic philosophy? If the answer is yes, then, how do they differ, and what is the better concentration, the better philosophy?

The answer of true immigration reform will come only when we formulate the right questions.

2

The Political Parameters of H.R. 1510

DALE FREDERICK SWARTZ *

I think most of us would agree that the Simpson/Mazzoli proposal is a first step in trying to come to grips with this extraordinary phenomenon of migration and one that will obviously continue. It is, in many ways, similar to what we have witnessed in past years and in some ways may change significantly in the near future. I think we should have in mind, as we make judgments about legislation, what kinds of challenges we, as communities, or leaders, or organizations or people face, apart from what may happen legislatively. In light of the above, it is necessary to talk a little bit about leadership, or the lack thereof, *e.g.*, what seems to me to be happening politically and what is likely to happen as legislation goes to the floor. Indeed, a recent information bulletin talks about what the politics look like and what the best guesses are for floor action. I'm going to try to summarize it for you.

First, I think it is very likely, as things now stand, that the rules committee will consider the Mazzoli bill soon. The bill was delayed as a result of a significant amount of pressure brought on Senator Pepper by some interest groups and Hispanic members of Congress for more time to try to sort out the issues. Pepper came under additional pressure to go forward and I understand he has made a firm decision that the Mazzoli bill will be in the rules committee soon (the rules committee is the gatekeeper for House floor action, and it is likely that we'll have a couple of days of hearings before rules). The prospects, it seems to me, are as follows, if the process goes forward.

First, the Roybal bill does not seem to be generating enough support to be considered, or to prevail,as a substitute to the Mazzoli bill. Even though the rule may be structured so that Roybal and his supporters will have an opportunity to have the bill voted up or down as a substitute to Mazzoli, as of now, it doesn't seem to have generated enough support to have much of a chance of success. That may change; it will depend upon the kind of advocacy and lobbying that goes on.

Assuming that that is the correct judgment, what I think we are looking at on the major issue areas is the following: employer sanctions will be in this bill and that the Hawkins' amendment on discrimination will be defeated.

* President, National Forum on Immigration and Refugee Policy

that may have a better chance of success than some other amendments coming out of the labor committee but, it is more likely that this antidiscrimination type of amendment will not have sufficient votes to prevail on the floor. So you will have sanctions similar to Mazzoli.

Secondly, the area of H2 temporary foreign workers is becoming very controversial. It appears now that the second major component of the education and labor amendment, known as the Miller amendments, would try to codify some existing worker protections now in regulation, put them into statute and, basically, not result in a significant increase in temporary foreign workers. It appears that those amendments, also from the labor committee, do not stand a very good chance of prevailing. So, it is most likely that what's now in Mazzoli on temporary foreign workers will come out of the House of Representatives.

In addition, an amendment, known as the Panetta amendment, was adopted last year by the agriculture committee relating to temporary workers for growers of perishable products. The Panetta amendment is being heavily lobbied by the agricultural interests; the rumor is that half a million dollars or more are being spent by the agricultural interests to push the Mazzoli provisions, H2 and the Panetta amendment. The Panetta amendment is picking up quite a bit of momentum and has a pretty good chance of succeeding.

Interestingly, the growers have retained a major republican public relations firm, Hill and Knowlden, and a major democratic law firm run by Bob Strauss to do their lobbying. There has not been much significant lobbying on the other side of the H2 issue, at least not in Washington. One of the reasons why it looks like Mazzoli on H2 and Panetta have a pretty good chance of prevailing is because of the people working on the issues, and the power they bring to the table. Most experts agree and the growers in fact testify that, if the Mazzoli provisions alone were to be adopted, a guestworker program currently ranging from appoximately 40,000 a year under H2 would increase to between 300,000 and 500,000 a year. And, if Panetta were also to be adopted, chances are that those numbers would be even higher. That would mean a total of 500,000 or 600,000 — certainly a dramatic change in the way we currently do business.

On the issue of asylum and judicial review and adjudications, it would appear that the current provisions in Mazzoli will probably remain intact. I think there will be efforts from both sides on the asylum issues to offer amendments. The administration will find people in the House to offer amendments to incorporate into the House bill: provisions on asylum, summary exclusion, and restrictions on judiciary review. I anticipate a close vote; but, since Rodino and Mazzoli and some other key members of the House support the current provisions of Mazzoli, that effort by the administration probably will not prevail. The vote might be fairly close, however,

and could affect what happens at a House/Senate conference. At the same time, there probably will be amendments from the civil rights community, the American Bar Association and other interest groups stating that the Mazzoli provisions on asylum and judicial review are too restrictive and abandon principles of the rule of law that have been in our system for a number of years. They would like to offer amendments to maintain current law as much as possible. I presume that such amendments will be defeated; what's currently in Mazzoli probably will come out of the House in the area of asylum and judicial review. Again, that is significant because it will change the way we do business in that area: deportation proceedings, exclusion proceedings, access to the courts, administrative structure, determing who is or is not allowed to enter or remain in the U.S.

The fourth area is legal immigration. As you know, the Mazzoli bill, like the Roybal bill, makes no fundamental changes in current law. It maintains the current system of legal immigration and the current preference system. The only major change would be an increase in the visas available for Canada and Mexico. The Senate bill, of course, makes some significant changes as outlined in this area. The chances are that what is now in Mazzoli, a change in increase in visas for Canada and Mexico, is what will prevail on the House floor, although an effort will be made, most believe, to incorporate in the House bill the kinds of changes in legal immigration now in the Senate bill.

There has not been a lot of lobbying on this issue one way or the other in recent months, but again the margin of the vote in the House could then affect what happens in Congress, *(i.e.*, the kind of deal that is struck when the House and Senate come together to work out the differences between the two bills). The final issue is the area of legislation. I think that there will be a lot of pressure on the House floor to restrict the legalization program to what is now in the Mazzoli bill. The probability of a more restrictive legalization program than what is in either Mazzoli or Roybal coming off the House floor seems greater.

In the House they will probably maintain the one tier approach to legalization (*i.e.*, everyone would get permanent residence status) but, there would be further restrictions on federal benefits, eligibility and cutbacks on the amount of fiscal aid or reimbursement given to state and local governments. The cost issue is a very big issue in legalization. Most state and local governments have stated that, if they don't get 100 percent reimbursement, they're going to oppose any legalization program. For various reasons, these governments are beginning to look at alternative formulas for reimbursement. It is possible that the administration may wish to preserve the prerogative to veto whatever may come out of Congress, particularly on the basis of cost.

Finally, I think that some of the significant differences between the Roybal bill and the Simpson/Mazzoli approach in regard to legalization have to do with how the system would be implemented. The definition of some of the

eligibility requirements makes a big difference if continuous residence means that you have to be in the country the date the legislation was enacted and have to prove you have not been out of the country for any more than thirty days in any one year, as in the Senate bill, or a somewhat more flexible approach to continuous residence as in the Roybal bill. Possibly, some of the eligibility requirements in Roybal could be incorporated into a Mazzoli bill with an eye toward meeting the charge or the concern that can enact the legalization program. I think there will be some action on legalization in the area of implementation from that general perspective. There are many other issues in this legislation relating to students and other matters; but, what the politics looks like in terms of likely outcome has not fundamentally changed. It is basically the same actors, making the same kind of efforts, moving in the same direction.

The Roybal effort is, in many places, considered a serious effort substantively but not so serious an effort politically. In other words, a lot of people that I have talked to have really taken the time and effort to get into the substance of the Roybal bill, which is often difficult to do. They seem to have more interest in it or seem to take it more seriously than those who have a kind of more superficial understanding of what it is about. What is said to me by many congressional offices, and to a lesser extent by the press or other people who are observing this process, but not necessarily intimately involved in it, is the following: because of the strong role Mr. Roybal and the Hispanic caucus played in trying to block action, the presumption is that the Roybal bill is nothing but an obstructionist tactic and that its real purpose is not to present serious proposals for immigration but rather to delay, to create chaos and to otherwise try to bog the process down. Personally, I think that this is an incorrect, unfair, unfortunate characterization of the Roybal initiative. To me there seems to be a feeling that, because Mr. Roybal, the Hispanic caucus and many of the interest groups supporting the Roybal bill have aligned themselves with those who are fighting everything in the last two years, this bill represents another tactic. I think you should be aware of that kind of characterization in talking to members of Congress and other interest groups. I don't think it is accurate; the Roybal bill should be given a hard look based on its merits.

Finally, it seems to me that the 1984 election is affecting the atmosphere significantly. In my view, big political judgments are on the minds of the leadership, particularly in the House. To me, the Democrats seem concerned that, right now, they are in a fairly difficult position. If the Mazzoli bill goes forward in its correct form and, if the prospects for an outcome are pretty much as I have outlined, then Democrats may face Democrats during a House floor debate as we saw in the end of 1982. They may face Democratic oriented interest groups not happy with each other; this issue continues to be a somewhat divisive issue at a time when the Democratic party wants to try

to unify its constituencies for the purpose of the election.

At the same time, the White House — Republicans — are in a pretty strong position; if nothing happens in the House of Representatives then they, if they wish to do it, have an election issue and they can blame the Democrats for blocking immigration reform and make that an issue which may prove effective for them politically. And if, as now appears more likely than not, a bill passes the House or closely resembles the Senate passed bill — a policy on immigration that the Adminisration is fairly comfortable with — then, their administration may be in a good position to take credit because they have really been the ones pushing for immigration reform. Right now, the Democratic Party doesn't seem to have a policy on immigration; the Administration does. Those may be the kinds of concerns and considerations that are, practically and politically, in the minds of O'Neil, Pepper and others who have to come to grips with what the House ought to do and when it ought to do it.

In terms of framing judgments, it is indeed important that each of us be clear about the principles or values which we use to make judgments with regard to the future of U.S. immigration policy and the kinds of legislative issues that are before us. For me, and I presume for all of us, the first principle from which all else flows, from which many judgments must be made is a simple one — that all men and women are created equal. Therefore, they have certain inalienable rights. As a society fundamentally based on the rule of law, we should, whether dealing with strangers or citizens, value human beings as beings who have certain rights that should be articulated, respected and enforced. As you look at the kinds of questions that are presented by Simpson/Mazzoli or Roybal, that simple but fundamental principle should always be in your head. What happens on the streets will be consistent with the kinds of principles or values that you think are fundamental.

Obviously, I think that practical judgments have to made, *i.e.*, judgments about the efficacy of the various proposals that are put forward: will employer sanctions work or not? If you come to a judgment that they will work, then that might lead you in a certain direction and you will be more willing to take the risk of discrimination or other kinds of risks which flow from sanctions. If you don't think sanctions are going to work, then you might come to another judgment about the calculated risk of looking at issues like discrimination, impact on business, civil liberties concerns, etc.

Finally, here is another kind of broad suggestion. How will the resolution of the legislative issues now before Congress affect the future? I personally think that the judgments made about this legislation will have a lasting effect not only with regard to changes in the law and practices, etc., but on how we see ourselves and how others see us in other parts of the world.

Recently, in the *Washington Post*, a story appeared on how Indochinese resettlement in Northern Virginia is causing "white-flight". That is, white

students are leaving the public schools and the reasons given by many of their parents is the unease that they feel about having their children educated in schools where a significant number of the population are refugees. Regardless of whether the backlash is manifested in that way or is manifested in terms of rhetoric or tactic of some of the advocacy groups who used to think we have enough people here already; regardless of the kind of language that's part of the debate, or how the press plays the issue, we are facing a fundamental challenge to our tradition as a nation, as a pluralistic society that respects and seeks always to do better. That is the real challenge to us. The legislative debate has heightened and framed that issue to some extent and, we had better be alert to it. It's been a long time since we have had immigration related riots in this country. We had one in Miami in 1980 and in the judgment of many people, immigration was a significant contributing factor. Years have passed; I don't want to predict doom; I think we can do better. But, we need to challenge ourselves. What's going on in many communities right on the streets, under the surface, often is pretty tense. There's a lot of resentment out there that needs to be addressed.

Another issue is foreign policy and migration. Salvador might be the most immediate example but, whatever the U.S. and its allies do or do not do abroad, or what other countries do or do not do abroad with military assistance, trade, investment, population related issues, deterioration of the land, clearly, there is growing recognition of the cause of relationships between international developments, foreign policy and the movements of people as refugees. I don't think that migration is on the table in this country as a major national policy issue but, personally, I think it ought to be; as leaders in your community it is something for you to think about.

Next comes naturalization — today there are seven million people residing in the U.S. who are immediately eligible for citizenship. Another four-five-six million undocumented aliens are disenfranchised (*i.e.*, they are not part of our political system). About 1.2 million refugees are processed through the citizenship pipeline. Great opportunities exist for all of us — churches, labor unions, governments and businesses to work together to help people acquire citizenship; that is the challenge for our society, and it affects the politics of all these issues. If you look at where many of the newcomers are living today, you're looking at significant potential electoral impact in the short term as well as in the long term. Many people may respond differently to that but, I think that common sense will affect the future just as it is affecting the politics of Simpson/Mazzoli today.

Concerning refugees and asylum, the issues are obvious and continuously desperate and, yet, practices in the last three or four years in regard to such issues have changed; I believe that they would change in more ways depending upon the immigration law that is enacted (*i.e.*, if you have a big guestworker program, it will have an impact on public and political attitudes toward refugee admissions, etc).

The final issue is institutional relationships. One of the things that I observe in the work that I do with a lot of different kinds of interests groups is that there are a lot of new, positive, constructive relationships among communities and groups that haven't worked together in the past; such relationships have evolved around efforts to come to grips with difficult questions. At the same time, a lot of tension, uncertainty and suspicion exists among communities and groups that often agree when it comes to values and policy outcome. But, for whatever reason, the character of the relationships is not equivalent to the commitment of certain principles and values (*i.e.*, how we house institutions or organizations, communities, how people do business, how we communicate with one another, how people cooperate or not). The attitudes they have toward one another are affecting the politics of Simpson/Mazzoli now, at the operational level (what happens day in and day out of in the communities); they are also affecting our ability to do our job well.

Whether some people fear the emerging Hispanic minority (and what that would mean politically over time), or the immigration debate itself, new actors, state, local governments, and environmental groups were not major actors in immigration until the last four or five years. An old power *vs.* a new phenomenon is emerging throughout this field. Keep that picture, that notion, in your mind and it may help to explain why some of the things that seem to be happening, and secondly, why the newer powers and the younger leaders need to be respectful and work closely with their elders, and vice versa. If we meet that challenge head on, we may all be in a better condition.

3

Presentation on Simpson-Mazzoli

RICHARD P. FAJARDO *

IN recent years, issues concerning U.S. immigration policy and immigrants' rights have become increasingly important to MALDEF, because of their significant impact on our Hispanic community.

In particular MALDEF has adamantly and actively opposed the Simpson-Mazzoli bill since its introduction last year.[1] Our opposition to the bill is not to be confused with opposition to immigration reform. MALDEF, like many other Hispanic organizations favors fair reform of our immigration laws. However, the Simpson-Mazzoli bill is based upon misinformation about the nature and impact of the undocumented population. Moreover, the bill contains numerous inconsistencies and would impose heavy burdens on immigrant communities, especially Hispanics.

IMMIGRATION REFORM – IN CONTEXT

It is important to understand the current immigration debate in the broader context of U.S .social and economic conditions. The current version of the Immigration Reform and Control Act was first introduced in 1981 by Senator Simpson (R-Wy) and Representative Mazzoli (D-Ky). Employer sanctions, the key provision of the Simpson-Mazzoli bill, was first introduced in 1972, but was never enacted. However, two significant events intensified the 1981 immigration debate, as well as support for the Simpson-Mazzoli bill.

First, in 1981 there was a major influx of refugees, primarily from Asia, Latin America and the Caribbean. Cubans and Haitians arrived in Florida by boat, Indo-Chinese were resettled in various American cities, and Central Americans began coming to the U.S. in unprecedented numbers. Most sought refuge from the social, economic and political turmoil that engulfed their

* Legislative Staff Attorney, Mexican American Legal Defense and Educational Fund

[1] *See, e.g.*, Antonia Hernandez, *Testimony before the House Subcommittee on Health and the Environment, Committee on Energy and Commerce* (June 17, 1983); Antonia Hernandez, *Testimony before the House Committee on Agriculture* (June 15, 1983); John E. Huerta, *Testimony before the House Subcommittee on Immigration, Refugee and International Law, Committee of the Judiciary.* (March 14, 1983); Joaquin Avila, *Testimony before the Senate Subcommitee on Immigration and Refugee Policy, Committee of the Judiciary* (February 25, 1983).

homelands. These immigrants were highly visible because of their high numbers and cultural differences, and in many instances became the object of anti-alien sentiments in the communities in which they settled.

This culture clash was aggravated by a second event, the 1981 recession. The recession was the most severe economic downturn since the Great Depression. Americans, especially the unemployed, began to see the new arrivals as holding jobs that should belong to American citizens and residents.

It was in this atmosphere of cultural tension and economic slowdown that the immigration debate flourished.

EMPLOYER SANCTIONS

The heart of the Simpson-Mazzoli bill is the employer sanctions provision. The bill provides civil and criminal penalties for persons or entities who employ, refer or recruit undocumented aliens. This legislation attempts to reduce the number of jobs available to undocumented aliens, thus removing the economic incentive that draws them to this country. However, employer sanctions will not work; it will not stop, or even slow, the flow of undocumented immigrants. Moreover, sanctions will have a severe discriminatory impact upon Hispanics and other "foreign-looking" workers who are citizens and permanent resident aliens.

Employer Sanctions Will Not Work

The employer sanctions provision, while increasing the discrimination against Hispanics, will not stop, or even slow, undocumented migration to this country.

A recent General Accounting Office (GAO) study,[2] commissioned by Senator Simpson and published in April, 1982, concluded that employer sanctions will not effectively curb illegal immigration. The GAO surveyed 20 nations which had adopted employer sanctions. The study found employers were able to evade responsibility for employing undocumented aliens. Insufficient resources and personnel prevented effective enforcement of the sanctions provision. Employers found to have violated the law were either left unprosecuted or were punished with fines too small to be an effective deterrent.

More importantly, the bill makes no attempt to deal with any of the other reasons why persons immigrate to the U.S. Many aliens come to this country to be reunited with their families, others flee from the political, social and economic upheavals of their home countries. Nor does the bill make any attempt to cooperate with other countries such as Mexico, to resolve the political or economic problems which encourage aliens to leave those countries.

[2] General Accounting Office, *Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries* (August 31, 1982).

Finally, it is important to realize that Simpson-Mazzoli is not a jobs bill. Many Americans erroneously believe that Simpson—Mazzoli bill will free jobs for U.S. citizens. However, many undocumented workers are employed in jobs that citizens will not take.[3] Thus, employer sanctions will not free more jobs for American citizens and residents, but instead will have the opposite effect, making it more difficult for Hispanics and other immigrants who are authorized to work to find employment.

Employer Sanction Will Be Discriminatory

The employer sanctions provision will have an extremely discriminatory impact upon the Hispanic community. These discriminatory aspects of the bill will be manifested in a number of ways.

First, employer sanctions will create a suspect class of persons: all persons who appear "foreign" will be suspected of being undocumented aliens. Undocumented immigrants are erroneously perceived to take jobs away from U.S. citizens, make extensive use of social services and otherwise drain the U.S. economy. Many Americans perceive the problems of illegal immigration to be associated with Latin American or Caribbean immigrants. As a result there persists a pervasive anti-alien sentiment in many parts of our country. Since many immigrants both documented and undocumented, share many of the same characteristics, including appearance, culture, language, etc., it is not surprising that little distinction is made between legal and illegal immigrants.[4] In fact, it is not uncommon for communities where legal immigrants have settled from developing countries, for residents to "routinely comment upon the country's illegal immigrant problems by reference to this entire new immigrant population".[5]

The employer sanctions provision encourages and exacerbates these anti-alien sentiments. Employers are now asked to be vigilant against hiring "illegal aliens". Thus, all persons who exhibit those characteristics thought to be associated with undocumented immigrants will be scrutinized.

The immediate consequence of the sanctions provision is that employers, faced with possible fines and penalties if undocumented workers are found in their employ, will simply refuse to hire Hispanics and other "foreign-looking" individuals. Even those employers who do not wish to discriminate against

[3] *See*, Larry Stammer and Victor M. Valle, *Most Aliens Regain Jobs After Raids, Los Angeles Times* (August 1, 1982). After Operation Jobs, the national campaign of workplace raids conducted by INS, a survey of businesses targeted for the INS raid indicated that 80 percent of the jobs vacated by undocumented workers apprehended in Los Angeles and Orange counties were subsequently filled by undocumented workers. Employers interviewed by the *Los Angeles Times* stated that citizens and legal residents hired to fill the vacancies had left, either because the pay was too low, the working conditions were not to their liking, or the job was too demeaning.

[4] Milton Morris and Alberto Mayo, *Illegal Immigration and U.S. Foreign Policy*, (U.S. Department of Labor, 1980).

[5] *Ibid.*

Hispanics, will, in an effort to comply with the law, resolve questions of doubt in favor of not hiring any one who might appear to be undocumented. In addition, employers who do wish to discriminate, may now defend their actions by claiming Hispanic applicants failed to produce sufficient documentation to prove they were entitled to work.

A second way in which discrimination will surface is that INS will target their enforcement operations to those industries and communities with high Hispanic populations. The INS does not have the resources to enforce current law, much less the new responsibilities the employer sanctions provision will impose. Thus, the employer sanctions provision will be selectively enforced. In the past enforcement operations, such as "Operation Jobs" and "Operation Cooperation", have been disruptive to the work place and costly to employers. Therefore, employers will try to avoid being targets of INS enforcement by reducing their Hispanic work forces. This will result in fewer job opportunities for Hispanic citizens and permanent resident aliens.

Finally, the law will effectively require employers to enforce INS immigration law without the benefit of INS training. As a result, employers familiar with immigration law, will make mistakes that will cost Hispanic citizens their jobs. During Operation Cooperation the INS sought the cooperation of employers to idenitify undocumented workers and voluntarily remove them from the work force.[6] However, employers were unfamiliar with many of the documents which authorized an alien to remain in this country. Furthermore, the INS's computer files are not completely up to date. Thus, they cannot verify the undocumented status of all permanent residents or citizens.[7] The result is that Hispanic citizens and permanent resident aliens will have the burden of proving their documented status to the satisfaction of employers, and even then employers may still not wish to risk hiring Hispanics.

Current anti-discrimination laws will not protect Hispanic workers from the discriminatory impact of employer sanctions. Employment discrimination laws, such as Title VII, will be of little value to a worker who is turned away from a job. Moreover, Title VII protections only apply to all workers: employees in workplaces with less than 15 employees are not covered,[8] nor are seasonal employees[9] or aliens.[10] Finally, job applicants do not have the time and resources to become involved in costly and time-consuming administrative or legal procedures: their sole interest is in finding employment.

[6] *See e.g.* U.S. Civil Rights Commission, *The Tarnished Golden Door*, 70-73 (Sept., 1980) (An excellent discussion of some of the impact "Operation Jobs" had upon employers and U.S. citizens and legal resident aliens).

[7] *See*, Antonia Hernandez, *Testimony before the House Committee on Agriculture*, at 7-10 (June 15, 1983).

[8] 42 U.S.C. S2000 (e)-2(e).

[9] *Ibid.*

[10] *Espinoza v. Farah Manufacturing Co.*, 414 U.S. 86 (1973).

MALDEF has supported strong anti-discrimination remedies, not because we believe such provisions resolve the defects of employer sanctions — they do not. However, we do recognize that if employer sanctions become law, Hispanics will need some protection against the discrimination that is certain to occur.

TEMPORARY WORKER PROGRAM

There are other panelists who will speak on the specific proposals to expand the existing "H-2" temporary worker program, so I will not dwell on this aspect of the bill. MALDEF does oppose any expansion of the existing H-2 program.

The existing H-2 program contains two kinds of protections for farmworkers. It gives domestic workers the first priority in obtaining work, and provides wage and working condition protections for foreign workers to prevent them from being exploited or used to undercut the domestic labor market. The proposed H-2 program in the Simpson-Mazzoli bill would ease many of these protections and restrictions to make it easier for agricultural employers to use the program.

However, the current labor standards and provisions in the H-2 program have been inadequate to protect farmworkers from abuses, nor have the existing provisions been enforceable. Now is not the time to consider easing or removing farmworker protections or expanding the H-2 program.

These temporary worker programs do point out an inherent contradiction of this bill. Proponents of the Simpson-Mazzoli bill indicate immigration reform is necessary to control immigration, ostensibly to provide more jobs for U.S. workers. Yet these temporary worker programs provide for large number of foreign workers to enter the U.S. to work.

LEGALIZATION

MALDEF supports a legalization program which would grant legal status to undocumented aliens now residing in the U.S. Legalization is intended to grant undocumented aliens a legitimate place in the society to which they have contributed their labor and taxes, but who are subject to abuse and exploitation because they live outside the protections of our laws.

Legalization benefits all Americans. Undocumented aliens live in fear of detention and deportation. As a result, many fail to report crimes, illness, violation of housing, health and safety or labor laws. Thus, legalization integrates undocumented aliens into the mainstream of American life, conferring obvious benefits upon the aliens, with corollary benefits upon all Americans.

The alternatives to legalization are impractical, disruptive and expensive. Mass deportation, such as those which occurred in the 1930s, are disruptive to the lives of millions, including citizens and legal residents (who are

sometimes mistakenly deported along with aliens). Moreover, deportations are deeply offensive to the principle of a free society which the United States holds dear.

However, to achieve such a goal the program must include as many persons as possible. The qualifications must be clear, concise and unambiguous; applicants must be able to determine the eligibility requirements and whether they meet them. The offer to legalize must be genuine and not a pretext for massive deportations or repatriation. The legalization program must not risk deportation to seek legal status.

However, Congress has always shown a reluctance to adopt the kind of broad legalization program necessary to adjust the majority of undocumented aliens. Legalization is not a program of broad "amnesty", as is often characterized in the press. It first requires undocumented aliens to demonstrate continuous residency since the cutoff date. In many instances it will be difficult for persons to produce such documentation, especially since many aliens have made every effort to avoid leaving any trace of their presence.

Aliens must also demonstrate that they are admissible as immigrants. Under current immigration law, aliens may be denied a visa if they fall within any one of 33 "grounds for exclusion". The legalization program does give immigration officials the discretion to waive many of these grounds, but in most cases it will be nearly impossible for applicants to determine with any degree of certainty whether they are inadmissible, and, if so, under what conditions immigration officials will waive the reasons for exclusion. Thus aliens uncertain as to whether they will be eligible for legal status, will elect to avoid detection by not applying for it.

Even if aliens can demonstrate that they are eligible for legalization, many will only be granted temporary resident status. Persons with temporary status will have to apply for permanent status. This poses two problems. First, aliens may be confronted with additional requirements, such as learning English or civics. Second, by admitting aliens as temporary residents the INS can accumulate vital information such as addresses, telephone numbers and places of employment that may later be used to deport aliens who are denied permanent resident status. Thus, the INS can use the temporary resident status as a screening process in which it can exclude "undesirable" aliens, while accumulating the information necessary to deport them.

CONCLUSION

The Simpson—Mazzoli bill will have a detrimental impact on U.S. citizens and residents, and will not resolve the problems it is intended to address. More importantly, the bill would change U.S. immigration policies in a manner inconsistent with our history as a nation of immigrants.

On the one hand, Simpson-Mazzoli supporters indicate that they want strong controls and restrictions on legal and illegal immigration, yet they also

indicate a desire to expand the number of persons temporarily admitted to work in our agricultural fields. Proposals to increase the number of agricultural workers be easing the certification process and wage and work standards (which protect domestic and foreign workers) are especially troubling in light of a Congressional reluctance to enact a broad, generous and inclusive legalization program. The message to immigrants seems to be "you are welcome temporarily as agricultural workers, but not as legal residents".

There is a need for immigration reform. However, immigration reform must be fair and circumspect. Congress should not react to the problem of immigration with short term solutions or vindictive measures. More importantly, immigration reform must not be enacted at the expense of U.S. citizens or resident aliens. Instead Congress should strike a balance of comparisons for immigrants and safeguard for our national interest.

4

Florida Coalitions and the Expansion of the H-2 Program: A Personal Witness

Rev. Frank O'Loughlin*

It will be clear that I bring to this discussion none of the fine analysis or statesman's overview that you have been hearing. Let me come as a witness.

The topic of debate in my town this week was babies. How many do we burn each year? How many can we reasonably burn each harvest in the one-room, $85-a-week lean-tos that pass for human habitation? There was heartening honesty from the County Medical Officer: "You can't deliver health care here without first razing the whole town to the ground." The electrical inpsector pleaded, "For God's sake, don't anybody go to bed without unplugging this mess." A spokesman for the landlords argued, "We all live differently. We can't all live like you. You don't cause fires, they happen. If you're going to die, you're going to die." The County Commissioners agreed: "Let's not point the finger at anyone." "Regardless of its condition, it is a roof over their heads, and even if the rain comes through, they call it home." Aren't they better off than the families who live in their cars or under sheets of plastic in the groves?

I went from the County meeting to the Miami Medical School. The students are worried about "Dirt Bag Syndrome", a reluctance they have detected in physicians to care for the indigent. Since I live among farmworkers, a working class whose disastrously low income and generally inferior state of health notoriously repel physicians' attentions, the interns thought I might have an insight.

Lack of housing, lack of access to medical care are just two problems of farmworkers.

There is a massive, marvelous food producing mechanism at work, largely mechanized in most of the country during the regular annual harvest, but in California and Florida, in the special winter vegetable and tropical fruits

* Director, Rural Life Bureau, Archdiocese of Miami, and President, Florida Non Profit Housing, Inc.

harvest; it is still labor intensive, primitive and virtually devoid of mechanization.

Some would question if we need much of that special industry. I don't know, for instance, if we need that little part of the sugar industry that still, at the end of the 20th century, cuts cane with machetes and disables up to 40 percent of its harvesters every season. My suspicion is that those machetes would quickly be replaced by available technology if immigration policy did not admit a sub-class of sub-American machete-wielders whose only protections are indirectly derived — the Adverse Effect regulation: they may not be exploited beyond the tolerance of the workers they have displaced.

They would not, of course, be recruited, imported and employed if they were not exploitable beyond the tolerance of the workers they have displaced. And that is the issue I need to raise with you.

Is Simpson-Mazzoli the proper instrument for determining which parts of the sugar industry will prosper and which decline? Isn't it the business of immigration law to decide such questions as who shall win admission to full citizenship? Don't you create unfortunate boondoggles when you subordinate issues like individuals' rights and the conditions in which they work to other considerations? Isn't it precisely because such peripheral issues influenced another generation of lawmakers that your rewrite is thought so urgent? When a Cuban sugar millionaire in Palm Beach announced that "We had to come to the United States to realize the full possibilities of exploitation", isn't it clear that he is not alone in his marveling at how our labor laws are fashioned?

I am invited here to query how an immigration bill became an agricultural workers bill.

If we are to believe the editorial writers of most of the national press, the public fully endorse the concept of immigration law reform. (The silence of the presidential candidates on the issue might support another view.) It is far less clear that Americans recognize that, in passing a bill freighted with the Mazzoli/Panetta temporary worker provisions/amendments, they are buying into a massive program of a kind which they have vehemently repudiated in the past.

The only press awareness I have seen has been at the Miami Herald and the *Palm Beach Post*, two papers which are vigilant on this issue because their acquaintance with South Florida's H-2 experience makes them view expanded temporary worker programs with apprehension. Both papers have endorsed immigration reform, but both would kill the bill before allowing H-2 expansion. They recognize that Simpson/Mazzoli is more immigration restriction than reform (the Herald doesn't seem to mind that), but they suspect that you are buying off one part of the opposition in the worst possible way. Neither publication is unaware of or indifferent to the labor needs of Florida agriculture. Why their jaundiced view of its tampering with

the immigration bill? One reason is that they know that Florida agribusiness has never had a worker shortage but has a perennial job shortage.

A Department of Labor investigation called Operation Everglades was conducted in the South Florida tropical fruit industry last summer. The groves were in a remote part of an Indian reservation called Devil's Garden. Not a restroom for fifty miles. Three to five thousand workers were bused in each day by crewboss/labor contractors from their winter work camps up to four and five hours away (in Wauchula, Bowling Green, Vero Beach and Indiantown). The crop,lemons for table fruit, is stained or blemished if handled while it is wet. So the workers, arriving in the groves at 10:00 or 10:30, had to sit and wait until the midday heat had dried off the fruit. They never began picking before noon or 12:30. Pay was by piece rate — fifteen dollars for a full bin of lemons. Only full bins were paid for. By six in the evening it was time to start the long drive home. The Department of Labor found that the regular workers took five and a half hours to fill a bin. The afternoon rains often interrupted work so that there were many occasions on which people had spent two sixteen hour days and never made a full bin — and so, had never earned anything, not even the $15, minus $1 witheld for Social Security, for lemons or the $10 a bin paid for limes.

The contribution of Simpson/Mazzoli will be to add temporary workers to this situation.

Why do workers tolerate such a life? How can an industry afford to so mismanage workers? The farmworkers have a choice between staying in Florida, picking tropicals with a crewboss, or migrating north. Only the most desparate go all the way to Michigan now that gas costs make the trip a sure loser. Most go as far as the Carolinas. But when a grower calls from, *e.g.*, Scranton, Pennsylvania to say he has 250 acres of tomatoes and needs 100 workers, the crewleader asks, "When do you need us?" The answer to that question depends on a variety of factors such as: When will the tomatoes be ready? and When will the market be good? Hard to tell. Err on the side of being early. Let them come and wait... sometimes into peonage.

The costs of the system are borne by the farmworker himself and increasingly by government relief and private charity which support farmworkers at the subsistence level until their services are needed. If farmers were required to bear the cost of supporting the surplus labor force, other alternatives would quickly be found; farmers would adjust their planting schedules or pursue new technologies which would keep the demand for labor more even during the growing session.

The $18 billion fruit and vegetable industry has never been sophisticated in its use of labor. In the mid-sixties when I first arrived in Florida, the majority of farmworkers were Black Americans. They were routinely denied basic rights. Local police shunted them from job to job by invoking the vagrancy laws. Now that aliens have joined them in the fields, immigration laws serve

the purpose of the vagrancy laws in maintaining a docile, available workforce, "working and scared", without complaint. Border Patrol raids signal when it's time to move on to new harvests.

As you know, the industry escaped the New Deal. The political price of reform was an exemption for agriculture: no child labor laws; no minimum wage laws. The New Deal safety net relied on the National Labor Relations Act and the Fair Labor Standards Act to strengthen the economic position of the worker, with unemployment insurance and social security to shift part of the social costs of unemployment or infirmity to the employer. All these measures initially exempted farmworkers.

Many of these exemptions have been phased out in the seventies. Unfortunately, the exemptions are often merely transformed into new exemptions based on alienage. U.S. farmworkers finally came under unemployment compensation in 1978; alien workers remain ineligible, as they are ineligible to live in Farmers Home Administration housing, or to receive help from legal service programs or, of course, food stamps and social security. The progress in the equal treatment of farmworkers has been rendered largely illusory by a shift to alien workers.

Mazzoli/Panetta proposes to take this one step further by creating whole new classes of aliens who will be exempt from benefit programs available to citizens and permanent residents. The House Judiciary Committee's version strips transition workers of U.S. labor protections which cover them now (even though they are now "illegals"). This is the result of extending, in one section of the bill, all the federal labor law protections which are "applicable" to agricultural workers, and then, in a different section of the bill, amending the Migrant and Seasonal Agricultural Worker Protection Act to exempt from coverage all transition workers. The thousands of transition workers will then have no recourse against employers who recruit them through false promises, transport them in unsafe vehicles and house them in substandard, condemned housing. Mazzoli/Panetta represents our determination to favor the interests of unscrupulous growers and labor contractors at whatever cost to the workers. Whatever the good intentions of particular governmental agencies, the ultimate goal of the State will be to preserve the present hegemony.

It takes a special logic to argue that a labor shortage exists in a country boasting record unemployment. Proponents of temporary worker programs have to counter news stories of pitched battles between groups of workers fighting for jobs in the California and Florida fields. They have to contend with the published boasting of growers that they fired their entire work force and found five applicants waiting for every job (Robert Lindsay, *N.Y. Times* August 19, 1983). West Coast farm workers have testified at every opportunity to the high unemployment in their ranks.

Dismal poverty tells the Florida story. The lack of housing and health care,

which tops every survey for farmworkers' needs, is directly related to income. ("Farmworker Needs—Agency Services," Florida Technological University, 1977.) Wages reflect the competition for available workers and wages have not changed in ten years. In a decade which has seen salaries everywhere rise to keep pace with inflation, the piece rates paid in Florida have remained at 55 cents for a 95 lb. bag of oranges, 35 cents for a bucket (⅝ bushel) of peppers or tomatoes. The truth is that there are never more than two weeks in the year when all the workers are employed. During the rest of the year, that most inept of personnel managers, the crew chief, hires on the basis of a "deportation index". His preferred crew is alien, without work authorization, male, young and in his debt. Least desirable are stable, experienced American workers.

We are now collecting testimonies that growers of the famous Indian River citrus in the Okeechobee and Fort Pierce areas have taken advantage of the 1984 freeze and accompanying work shortage to drop piece rates to a record low. Citizen Black workers have testified that they are being paid $2.50 a tub of oranges at such huge operations as Evans, where $5.50 has long been standard. The workers claim that even lower rates are being paid to non-citizen labor.

Statewide, 200,000 farmworker families are available for a peak of 100,000 jobs. (Dr. James Horgan, St. Leo's College, Southern Exposure, 1983, Robert Emerson, U. of Florida.)

No matter how abusive the crew boss, poverty brings the workers to him. He simply drives to the loading ramp at 5:00 a.m. and fifty people jump on his bus. Then he takes them to the fields where they sit, sometimes for hours, before being put to work. The piece rate system guarantees that the workers bear the cost. A measure of the working conditions is the agonizing now going on at OSHA over whether free drinking water and a toilet aren't too much to expect in agribusiness.

It is when we describe the working conditions of these people who literally "don't have a pot to piss in" that someone invokes the canard that these are not really American workers; that U.S. nationals won't do certain types of work; that the U.S. economy has become dependent on illegal immigrants who endure low pay and intolerable conditions in undesirable jobs that American workers will not accept. The truth is that legal residents dominate the work forces of every industry and occupation including agriculture in the U.S.. Of course, there are Americans willing to work out of doors and at menial jobs. People with American standards and aspirations will be less satisfied with many menial low wage jobs than would Third World entrants. But both groups will come to expect improvements and employers will have very little motive to improve those jobs if they have a ready supply of powerless foreign workers. (Ray Marshall, University of Texas).

Again, shortages of workers have never been the real issue. Numbers are

important as determinants of the amenability of the work force to highly erratic employment, to fight for the two or three days' work available each week and to accept the most deplorable wages and conditions. Massive surpluses are important but powerlessness and docility are the real issues.

I asked the Federal Wage and Hour people in my area what they would propose if given the opportunity to speak to Senator Simpson and Congressman Mazzoli. Their answer: A study of available workers by anybody credible *i.e.*, Wage and Hour or, an independent firm under contract to, say the Commerce Department.

From the employers' point of view, the picture is quite different. Present all the studies of the farm labor scene to the people who know it best, its incredibly inefficient labor managers, and they will still insist that they need to double or triple their available labor force. Every market is a "saving" of the crop; is by definition an emergency. The profitability of a crop can depend on catching the market at peak prices. Harvesting and shipping must be carried out as quickly as possible. Where not five workers were needed yesterday and none will be needed tomorrow, today five hundred are called for. As often as not, demand for harvesters by other local growers coincides. There is a momentary glut of work to be followed tomorrow by a glut of workers.

An important function of the various grower associations is to guarantee this large labor pool and fix cheap wage rates. Manipulation of immigration and employment service policies helps to create and maintain the pool of unskilled workers.

Farm labor is simply an appurtenance of farm business, to be available when needed, to be gone when not needed. One can cite daily outrages which illustrate the mentality: for instance, the massive Christmas freeze which destroyed an estimated one-third of Florida citrus. The agribusiness interests promptly got their declaration that eight counties were disaster areas and the industry eligible for emergency assistance. But the Governor did not feel that he could ask for Federal disaster funds for the workers.

How did an immigration law reform become an agricultural labor bill?

The current frenzy seems to date from the days of the Select Commission. Somewhere in those meetings the flow of undocumented workers came to be characterized as a problem. Until then most studies of the functioning of the Mexican economy and the structure of the U.S. labor markets tended to conclude that illegal migration represented not a problem, but a solution to several problems in both the sending and receiving countries. (Bustamante 1976, Barrera 1977, Portes 1974).

The perception that U.S. national interests were at stake led to stepped up Border Patrol enforcement and the prospect of employer sanctions. Agribusiness, as I have indicated, makes very good use of the Border Patrol, and absent, its interventions would enjoy a much less malleable workforce.

The industry has lived with employer sanctions since 1974. It has been illegal for farm labor contractors to recruit, employ or utilize with knowledge the services of any undocumented alien. (29 U.S.C. 1816).

Penalties for violating the Agricultural Workers Protection Act and its predecessor, the Farm Labor Contractor Registration Act are essentially the same as those provided for in the Simpson/Mazzoli bill: civil money penalties with criminal sanctions for willful violations. Long experience teaches that agribusiness has nothing to fear from employer sanctions legislation. The industry will not conform to the reforms envisaged by proponents of Simpson/Mazzoli; it will continue to prefer those employees who are in the most legally tenuous position.

A more ominous threat is the promised legalization of workers hitherto vulnerable to the threat of deportation. The lowest tier of employees, so critical to the imbalance of power in the fields, could move freely into the general economy or, worse, could now seek redress of grievances through collective bargaining; shades of the end of the *bracero* program and the rise of Cesar Chavez.

On the other hand, an opportunity was perceived. Two longstanding problems with the agricultural labor pool are that:

1. the worker cannot be permanently bound to the industry, and dreadful personnel policies assure that he will not be bound to any member or segment of it;
2. farm pay in the West has shown a mild but disquieting tendency to rise.

Faced with similar problems, growers in 1941 found, in the war, a pretext for requesting a subsidy in the form of alien workers. The impetus for a six-million-man program, administered at colossal public expense, was the grower claim that a labor shortage would develop as a result of wartime industrial mobilization. The initial demand was for a simple lifting of all restrictions on border crossing, permitting growers to resurrect the system of private labor recruitment that had prevailed before the depression. But the Mexican government demanded border regulations and written contracts to protect Mexican nationals against abuse by U.S. employers. For as long as Mexico influenced conditions the program had limited appeal, but once the war was over, that influence diminished and the massive and infamous bracero program came to full flower.

Although the official purpose of the program was to cope with a proclaimed labor shortage, in effect the bracero program provided growers with a mechanism for recruiting a labor surplus comprised of the kind of docile, vulnerable workers they desired (Jones 1965). The decision-making structure guaranteed that the operation of the program would have nothing to do with any genuine labor shortage. Growers in each county were organized into

labor associations entrusted with the role of advising program officials. In practice, each labor association was able to determine unilaterally the number of braceros who would be recruited for the upcoming harvest, and the exact wage rates to be written into the contracts. The worst abuses of wetbacks continued now that they were dried-out.

Outwardly, the program was a radical move away from the vagaries of migration by drift. On the face of it the new system introduced planning, created a stable administrative machinery and laid down standards and directives by which operations were governed. The reality was the bracero himself: in apprehensive competition with five of his fellows for the one job offered, often illiterate, and always willing to fulfill his obligations on the trot, used by an employers' cartel to displace any domestic workers who resisted the set terms of employment (Galarza, 1964), and readily branded as undesirable, and deported, should he seek mechanisms for bargaining.

How is it possible that we are again contemplating massive temporary worker programs at the behest of agribusiness?

The Select Commission, after a dozen hearings, voted unanimously against recommending one.

The Reagan administration toyed with proposing a large program but found that it would not sell. They offered instead a little pilot program. Even that suggestion was greeted with public dismay.

Now the Simpson/Mazzoli Bill presents us with not one, but three programs which promise to flood the labor market with not less than half-a-million workers. These provisions were attached during Committee mark-up, and without public awareness. There is no doubt that an informed public would repudiate them as promptly as it did the earlier provisions. Horrible as the old government to government contract-labor-program may have been, what we are now contemplating, *e.g.*, Panetta, is much worse.

Even if we didn't have a deregulated and expanded H-2 and a Panetta amendment, the combination of the transitional program with the legalization of the undocumented would give us enough workers to displace the majority of domestic workers. That is an unconscionable assault on the livelihoods of close to 100,000 Black families in rural Florida, and how many more in the Carolinas and along the East Coast.

Why the credulity? On May 29, 1963 as the House terminated Public Law 78 the publicity mills of the agricultural corporations predicted a range of disasters: entire crops being lost, the price of food doubling, banks closing, canneries going bankrupt, family farming being ruined and Communism erupting in Mexico. Today, with the prospect of immigration reform, we are asked to envision amber waves of grain rotting from sea to shining sea, and not an American willing or able to save the harvest.

Why the capitulation on moral standards? Is agribusiness, in fact, so out of step with a free society that its very survival requires a permanent alien

contract labor force? Or is this after all what our system, our political and economic system, amounts to? Is this the democratic ideal, that our workers will be indentured aliens; braceros, not men but hands; an almost perfect model of the economic man, an "input factor" stripped of the political and social attributes that liberal democracy likes to ascribe to human beings?

Part II

Immigration Legislation Practice

5

Rights of Immigrants Under International Laws

PETER A. SCHEY*

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

THE Universal Declaration of Human Rights, proclaimed by the U.N. General Assembly in resolution 217A(III) of December 10, 1948, contains provisions of general scope and additional provisions drawing distinctions on the basis of citizenship. The Preamble to the Universal Declaration of Human Rights states that recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.[1] Article 2, paragraph 1, provides that "everyone is entitled to all the rights and freedoms set in this Declaration without distinction of any kind such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

While immigration status is not mentioned in this provision, both the text of the provision and debates thereon in various bodies "tend to show that the enumeration was not meant to be exhaustive and that article 2 was intended to have general application".[2]

Article 29 of the Declaration of Human Rights provides that any limitations on the freedoms and rights declared must be determined by law and "have as a purpose solely the protection of the rights and freedoms of others and the safeguard of 'morality, public order and the general welfare in a democratic society' ". *Ibid.* Article 30 prohibits any governmental actions aimed at the destruction of any of the rights and freedoms set forth in the Declaration.

The Declaration provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing, medical care and any necessary social services".[3]

* Director, National Center for Immigrants' Rights, Inc.

[1] *See*, generally, Sohn and Buergenthal, International Protection of Human Rights, Contemporary Legal Education Series, [1973], at 515.

[2] Report of the Secretary General, A/C. 3/35/WG.1/CRP. 1 (September 30, 1980), page 7.

[3] *See*, Articles 25 (2) and 26.

The duty to "observe faithfully and strictly" not only the provisions of the U.N. Charter but also the Universal Declaration was proclaimed by the U.N. General Assembly in the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples. Similarly, the 1963 Declaration on the Elimination of All Forms of Racial Discrimination recognized that every State "shall faithfully observe the provisions of ... the Universal Declaration of Human Rights".[4]

Some Articles in the Universal Declaration do distinguish on the basis of nationality status. For example, Article 13(2) provides that everyone has the right to return to "his" country. Article 21 recognizes the right of everyone to take part in the Government of his/her country and to have equal access to the public services in his/her country. The wording and history of these articles indicate that the benefits conferred by their terms were meant to apply only to nationals or citizens of a particular state and were not intended to include non-citizens.

Article 14 recognizes the right to "seek and to enjoy in other countries asylum from persecution". This right applies to "everyone" except those who claim persecution based upon "non-political crimes or to acts contrary to the purposes and principles of the United Nations".

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

The International Covenant on Economics, Social and Cultural Rights was adopted by the U.N. General Assembly, resolution 2200 A (XXI) of December 16, 1966.

Article 2, paragraph 1, provides that each Party shall strive to the maximum of its resources "with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...". According to Article 2, paragraph 2, "The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 2, paragraph 3, provides that "developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals." Discussions in the United Nations Third Committee show that the Covenant allows States Parties "latitude to make legitimate distinctions of individuals such as nationals and non-nationals".[5] Interestingly, developing nations supported the limitation of protections of the Covenant "to prevent non-nationals from monopolizing

[4] *See*, International Protection of Human Rights, supra, at 518.

[5] Report of the Secretary General, A/C.3/35/WG.1/CRP.1 (September 30, 1980), page 9.

the economy of developing countries".[6]

It should be noted, however, that the limitation found in Article 2, paragraph 3 (allowing States Parties to determine to what extent the Covenant will apply to non-nationals) applies only to "economic" rights under the Covenant, and not to "social" or "cultural" rights contained in the Covenant.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND OPTIONAL PROTOCOL

The International Covenant on Civil and Political Rights was adopted by the U.N. General Assembly on December 16, 1966. Resolution 220 A (XXI). It entered into force on January 3, 1976.

Under this Covenant, each Party State "undertakes to respect and ensure" the rights recognized in the Covenant to "all individuals within its territory and subject to its jurisdiction... without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Article 2, paragraph 1.

The provisions of the Covenant concerning remedies at the national and international levels appear to be of general application. Thus, Article 2, paragraph 3, of the Covenant imposes the obligation on States Parties to ensure first that "any person" whose rights and freedoms have been violated under the Covenant, shall have an effective remedy and secondly, that "any person" claiming such a remedy shall have his/her right thereto determined by competent authority.

Article 1 of the Optional Protocol to the Covenant provides that States Parties to the Protocol recognize the competence of the United Nations Human Rights Committee to receive and consider complaints "from individuals subject to [their] jurisdiction who claim to be victims of a violation by [any State Party to the Covenant and Protocol] of any of the rights guaranteed under the Covenant".

There are certain provisions within the Covenant which clearly do not apply to non-nationals of the States Parties. For example, Part II, Article 25 states that "every citizen" has the right to participate in the public affairs and to have access to public service in "his" country.

On the other hand, certain provisions specifically protect the interests of non-nationals. For example, Article 13 provides that "an alien lawfully in the territory of a State Party has the right not to be arbitrarily expelled therefrom", and "except where compelling reasons of national security otherwise require" to have his/her case reviewed by competent authority prior to expulsion.

The Covenant also provides that everyone lawfully present in the territory of States Parties shall have freedom of movement within the State. Article 12, paragraph 1.

[6] *Id.*, at 10.

All persons also have the right to leave the territory of any 12, paragraph 1.) All persons also have the right to leave the territory of any States Parties, including the person's country of nationality. Article 12, paragraph 3. Finally, Article 12, paragraph 4 provides that "no one shall be arbitrarily deprived of the right to enter his own country." This language has been interpreted to mean the person's country of nationality or of lawful permanent residence.[7]

Article 26 provides for the equality of all persons before the law and impose the obligation on States Parties to guarantee to "all persons" equal and effective protection "against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status". Discrimination against non-nationals of the States Parties appears to be prohibited. However, during discussion of the Article in the U.N. Commission on Human Rights and the Third Committee, several representatives stated that they felt that neither restriction of political rights nor measures to control the taking of property by non-nationals would constitute discrimination under Article 26. Other than these limitations, Article 26 broadly calls for the equal treatment of all people within States Parties before the law.

THE INTER-AMERICAN SYSTEM AND HUMAN RIGHTS IN RELATION TO IMMIGRANTS AND REFUGEES

Before the signing of the Charter of the Organization of American States in 1948, nine international conferences were held with representatives of American states. The rights of "aliens" and refugees were taken up at a number of these conferences.

The Second International Conference of American States, held in Mexico City from October 22, 1901, to January 31, 1902, led to adoption of the Convention Relative to the Rights of Aliens, signed January 29, 1902. The Convention provides that unless the Constitution of a State Party calls for a different result, "aliens shall enjoy all civil rights pertaining to citizens, and make use thereof in the substance, form or procedure, and in the recourses which result therefrom, under exactly the same terms as said citizens." While countries like El Salvador, Honduras and Guatemala have ratified the Convention, the United States has not.

At the Sixth International Conference of American States, held in Cuba from January 16 to February 20, 1928, the Convention on the Status of Aliens was approved. This Convention supplements the 1902 Convention mentioned above, and provides for "aliens" to enjoy, equally, with citizens, essential civil rights granted by the member States. The Convention states that aliens shall have equal enjoyment of the "legal provisions governing the scope of and usages for the exercise of said rights and guarantees". The parties to this Convention include the United States.

[7] Report of the Secretary General, A.C. 3/35/WG..1/CRP.1 (September 30, 1980), page 14.

The Sixth International Conference also produced the "Convention on Asylum". Under this Convention, persons who have committed common crimes and those who were deserters from land or sea forces were deemed ineligible for political asylum. Otherwise, asylum was to be granted to refugees "to the extent in which allowed as a right or through humanitarian toleration, by the usages, the Conventions or the laws of the country in which granted...". Asylum was required to be granted for a temporary period to ensure the safety of the asylum seeker. The Government from which the refugee was fleeing could demand his/her return upon guaranteeing his/her safe passage and fair treatment.

It was at the Ninth International Conference of American States held at Bogota, Columbia, in 1948, that the Constitutional Charter of the Organization of American States, the American Declaration of the Rights and Duties of Man, and the Inter-American Charter of Social Guarantees were discussed and approved. The Preamble of the Charter declares:

> "...the true significance of American solidarity and good neighborliness can only mean the consolidation on this continent, within the framework of democratic institutions, of a system of individual liberty and social justice based on respect for the essential rights of man...."

The original Charter was signed at Bogota on April 30, 1948, and entered into force on December 13, 1951.[8] The Charter contained a number of human rights provisions. Most important was Article 5(j) which declared that "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex." (This Article is now numbered as Article 3(j). Unfortunately, the Charter did not define these rights, nor did it describe the mechanism for their enforcement.

Article 15 of the Charter provided that "The jurisdiction of States within the limits of the national territory is exercised equally over all the inhabitants, whether nationals or aliens." Article 43(a) provided that

> "All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being..., under circumstances of liberty, dignity, equality of opportunity, and economic security."

Concerning the labor rights of all people, the Charter provides in Article 43(b) and (c):

> "Work is a right and a social duty.... (I)t should be performed under conditions, including a system of fair wages, that ensure life, health and a decent standard of living for the worker and his family....

[8] 2 UST 2394, TIAS No. 2361, 119 UNTS 48, 46 AJIL Supp. 43 (1952).

> Employers and workers, both rural and urban, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike...."

Based in part on the draft of the Universal Declaration of Human Rights, the American Declaration of the Rights and Duties of Man represented the first major attempt by the Inter-American system to document and list the basic human rights of the person.[9] The Preamble of the American Declaration provides that "The international protection of the rights of man should be the principle guide of an evolving American law." Article I mandates that "[e]very human being has the right to life, liberty and the security of his person." Article II provides, "All persons are equal before the law and have the rights and duties established in this declaration, without distinction as to race, sex, language, creed or any other factor."

Other "rights" granted by the Declaration include the inviolability of the home (Article IX), the right to "health" and "medical care" (Article XI), the right to an education (Article XII), the "right to work under proper conditions" and to a fair wage (Article XIV), the right to social security to protect the worker and his/her family from the consequences of "unemployment, old age, and disabilities" (Article XVI) and the right to due process in the country's court system. (Article XVIII).

Article XXVII specifically provides that "[e]very person has the right, in case of pursuit not resulting from common crimes, to seek and receive asylum in foreign territory, in accordance with the laws of each country and with international agreements."

It was not until 1959, at the Fifth Meeting of the Consultation of Ministers of Foreign Affairs, that a resolution was adopted establishing a mechanism which could hear and resolve claims of human rights violations under the OAS Charter or Declaration. The resolution (Res. VIII, Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12-18, 1959, Final Act, OAS Off. Rec. OEA/Ser. C/11.5 [English], at 10-11 [1960]) created the Inter-American Commission on Human Rights. The Commission can hear human rights complaints, and has the authority to issue recommendations to the governments of member States to take appropriate actions to protect human rights. It can issue studies and reports, and it can urge member State government to provide it with information about official policies and/or indivudal cases. The Commission's functions are spelled out in Article 112 of the revised OAS Charter.

[9] *See*, Ronquillo, "Mexican Undocumented: The International Law of Human Rights", *Migration Today*, Vol. VIII, page 9.

6

New Ground for Undocumented Aliens Plowed by the Courts

MAURICE A. ROBERTS *

MY topic is "New Ground for Undocumented Aliens Plowed by the Courts." However, after looking over my notes, I think the title of my topic should be changed slightly, to conform to what I am going to say. After the word "plowed", I am inserting the word "under". I do this because of an unmistakable trend in the courts, and certainly in the one court that matters most, the United States Supreme Court. It seems to me that the rights of aliens, which have so painstakingly been carved out by the courts in recent years, are very gradually being buried.

It wasn't always this way. You may recall that many years ago it was actually the Immigration and Naturalization Service itself and the old Board of Review (predecessor of the Board of Immigration Appeals) which filled in the gaps left in the immigration statutes by imaginatively creating various types of extra-statutory remedies. Parole was exercised and voluntary departure was granted long before the statutes gave these remedies statutory sanction. Even Section 245 adjustment, created by the 1952 Act, was anticipated by the coupling of the extra-statutory remedies of voluntary departure and preexamination.

In fact, the Service became so liberal that Congress didn't like it too much. In the 1952 Act, which was enacted in a period of Cold War and generally repressive attitudes toward aliens, Congress specifically cut back on some of these liberal remedies created by the Service. The courts, of course, had to construe the new legislation and many of the lower federal courts took the legislation literally. But the Supreme Court pointed out realistically that Congress could not have intended some of the absurd results which would flow from a literal construction of some of the statutory provisions, and the Court was in the forefront of giving reality and rational meaning to the words of the statute.

A typical example was the decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1983) where the Supreme Court put a very realistic gloss on the "intent"

* Editor, *Interpreter Releases*. Former Chairman, Board of Immigration Appeals, Department of Justice.

exception to the statutory definition of "entry". The Court held that Congress could not have intended that a brief, casual, innocent departure should be regarded as meaningfully interruptive of a resident alien's lawful presence in the United States, so as to render him deportable on his return from a few hours absence in Mexico. The lower courts, too, became active in filling in the statutory gaps. The year after *Fleuti* , the Ninth Circuit Court of Appeals in *Wadman v. INS*, 329 F.2d 812 (9th Cir. 1964), used the *Fleuti* standards to determine whether there had been a breach in the continuity of the physical presence which Section 244 of the Act requires for suspension of deportation.

The Service has learned to live with the *Fleuti* and *Wadman* decisions. In fact, it has been helpful to the Service to have these ameliatory interpretations of the statute available. Other lower court decisions have been similarly useful. Back in 1976, the Second Circuit in *Francis v. INS*, 532 F.2d 268, created the remedy of nondeportability out of Section 212(c), which is an exclusionary waiver provision. The Second Circuit did this on constitutional grounds, and the Service and the BIA have learned to live with that decision, too.

In recent years, however, there has been a gradual shift in the attitude of the Supreme Court. This has been partly to changes in the Court's membership and partly, I think, to increasing general awareness of our growing immigration problems. The Supreme Court does read the newspapers, you know. I remember a few years ago when a former Commissioner came out with some figures on the number of undocumented aliens in the United States. The numbers were arrived at by the use of some fact-gathering techniques which were widely criticized when their use became known. In fact, Austin Fragomen, who is seated to my left, was one of those whose estimate was sought by the Commissioner, and as I recall he sent back a hot letter pointing out that this is not the way to achieve valid statistical results. At any rate, it was then bandied about that there were up to 20 million "illegal aliens" — that was the phrase used — in the United States. These figures made their way into the Supreme Court decisions. If you examine some of the Supreme Court decisions that started to clamp down, you'll find that the Court was horrified at the Service's seeming inability to enforce the immigration laws. This has led to an unmistakable tendency on the part of the Court in recent years to avoid hampering immigration law enforcement. The rights of aliens, and particularly undocumented aliens, inevitably suffer.

The Supreme Court, in recent years, has shown its disapproval of activism and liberal construction on the part of the lower courts. In case after case, it has applied a narrow construction to the immigration laws and has deferred to increasingly harsh administrative construction.

Typical is *INS v. Wang*, 450 U.S. 139 (1981), in which the Court stated flatly that when it comes to the question of extreme hardship in suspension of deportation cases, it's up to the BIA to determine whether that concept

should be construed expansively or narrowly. If the Board decides that it should be construed narrowly, it's not the business of the courts, even if they disagree, to construe it otherwise; deference must be paid to the administrative construction.

It wasn't long after that that an estoppel situation was presented to the Court in *INS v. Miranda*, 459 U.S. 14, 103 S.CT. 281 (1982). There, the alien was married to a United States citizen and she filed an immediate relative visa petition in his behalf. For some unexplained reason, approval of the petition was held up for 18 months and in the interim the marriage broke up. The alien was no longer qualified for immediate relative status and he was ordered deported. On judicial review, the Ninth Circuit reversed the deportation order, holding that the Service was estopped from deporting him when he could have had his status adjusted it it had not been for the Service's unexplained delay. The Supreme Court reversed. They pointed out that the Service was having a terrible time because of the many fraudulent marriage cases requiring investigation, and 18 months delay wasn't unreasonable, and anyway, you have to defer to the Service.

Now, the chickens are coming home to roost. Just this very term, in January of this year the Supreme Court came out with what I consider to be a shocking opinion, *INS v. Phinpathya*, 464 U.S. 104 S.CT. 584 (1984). You'll notice, incidentally, that most of the cases that are before the Supreme Court now are cases in which the INS is the petitioner. The Service has sensed the change in the attitude of the Supreme Court and is bringing more petitions for certiorari and, I might add, is bringing them successfully. The Supreme Court is granting certiorari and is reversing, and there are so many cases there now that it's problematic what's going to happen. Let's look at the highlights:

In the *Phinpathya* case, the question of continuity of physical presence for suspension purposes was presented. The alien in that case had gone back to her native country for 3 months to visit her sick mother. The Ninth Circuit, in accordance with its *Wadman* percept, had applied the *Fleuti* standards and had overruled the BIA conclusion that there had been a break in the continuity of physical presence. The Supreme Court reversed and, in doing so, gave the Service a lot more than it asked for. The Service was not challenging the applicability of the *Fleuti* standards to the question of continuous physical presence. What the Service was contesting was the application of those standards on the facts of this particular case. The Supreme Court went whole hog right down the line and they said, this statutory provision of continuous physical presence must be applied literally. You may not go into the question of how long was the absence, or how innocent. If there was any absence, that broke the continuity of physical presence. Now, this holding is going to cause a tremendous amount of damage and, in my estimation, needlessly. Here again, the Court is hewing to what seems to be a line designed to assist the INS in enforcing the immigration laws. I think this case is going to have

repercussions that are as yet unknown. I would point out in this connection that the INS is careful in selecting the cases that it asks the Supreme Court to review. There had been another case involving the same issue, also out of the 9th Circuit, where the facts were more sympathetic, *Kamheanpatiyooth v. INS*, 497 F.2d 1253 (9th Cir. 1979). They didn't go up on that. In the *Phinpathya* case, it happened that the alien was not only out of the United States for 3 months, but committed fraud in order to get back. That was a factor that weighed heavily in the Court's determination.

There are now pending before the Court any number of cases in which decisions can be expected before long and which will have tremendous impact. This subject will probably be discussed in greater detail tommorrow by Debbie Anker in her presentation on asylum. I will first give you a "once over lightly" review of the cases. On December 6 of last year, oral argument was heard in the case of *INS v. Stevic*. This seeks review of the decision in *Stevic V. Sava*, 678 F.2d 401 (2d Cir. 1982). The Court of Appeals there held that the standard applied by the BIA for providing persecution under Section 243(h) is much too onerous, heavier than the statute requires. The BIA had held that an alien seeking asylum has the burden of establishing the clear probability that he will be singled out for persecution. This standard goes back to the definition fashioned by the Board in *Matter of Dunar*, 14 I&N Dec. 310 (BIA 1973). I happened to have a hand in formulating that standard and at the time I thought it was correct and many courts have accepted it. There have been intervening changes in the statute and some courts have since gone the other way. The issue is now before the Supreme Court and one of these days it will come out with a decision. If it continues along the trend that I have noted, it will agree with the Service position.[1]

On the same day, December 6, 1983, the Court heard oral argument in another case involving the rights of undocumented aliens in another context, *Sure-Tan, Inc. v. NLRB*. There, the employer is seeking reversal of the decision in *NLRB V. Sure-Tan, Inc.*, 672 F.2d 592 (7th Cir. 1982). The Court of Appeals there ordered enforcement of an NLRB order for reinstatement and back pay on a finding of constructive discharge and unfair labor practice. The NLRB found that, in retaliation for their activities in behalf of a labor union, the employer had sent a letter to INS inquiring into the immigration status of the undocumented alien employees, as a result of which they were arrested by INS and sent back to Mexico under voluntary departure grants. That case, as I mentioned, was argued and is awaiting decision in the Supreme Court.[2]

[1] On June 5, 1984, in *INS v. Stevic*, 467 U.S._____, 104 S.Ct. 2489, the Court reversed the decision below. Without determining the standards applicable to asylum claims under Section 208, the Court ruled that an applicant for withholding under Section 243(h) must prove that it is more likely than not that he will be persecuted.

[2] On June 25, 1984, in *Sure-Tan, Inc. v. NLRB*, 467 U.S._____, 104 S.Ct. 2803, the Court affirmed on the substantive question but reversed on the question of remedy.

In January of this year, the Court heard oral argument in a case that Wade Henderson mentioned, *INS v. Delgado*, No. 82-1271. The INS there seeks reversal of the decision in *ILGWU v. Sureck*, 681 F.2d 624 (9th Cir. 1982). The Court of Appeals held that INS "area control operations", in which INS agents "survey" factory employees at work to determine whether any are undocumented aliens, violate the Fourth Amendment. This occurs, the courts held, when the INS seizes the work force by creating a coercive atmosphere and sealing factory premises by such means as stationing agents at exists and entrances, and when the INS undertakes detentive questioning without articulable objective facts to support a reasonable suspicion that a person is an undocumented alien. here again, I am not too sanquine as to what's going to come out of the Supreme Court.[3]

Only yesterday, the Supreme Court heard oral argument in *Bernal v. Fainter*, No. 83-630, a case involving the constitutional rights of aliens. You may remember that, about a dozen years ago, the Court came out with a series of decisions holding that it was a violation of equal protection for a state to discriminate against permanent resident aliens simply on the basis of their alienage. The questions arose in a number of different contexts: *Graham v. Richardson*, 403 U.S. 365 (1971) (public welfare); *In re Griffiths*, 413 U.S. 717 (1973) (admission to Bar); *Sugarman v. Dougall*, 413 U.S. 717 (1973) (eligibility for state civil service). The Court held simply that you cannot require United States citizenship as a prerequisite to these public benefits, unless a special state sovereignty policy is involved. Through the years, any number of state restrictions were striken as violative of the equal protection clause. But then, a few years ago, there came a change. Recently, the Court has been sustaining various state requirements for United States citizenship on the part of applicants for certain state jobs. One involved the position of a state trooper in New York, *Foley v. Connellie*, 435 U.S. 291 (1978). Another that just came out only recently involved the position of a probation officer in California, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). The case argued yesterday involves the question whether the state of Texas can require that a notary public must be a United States citizen. In *Vargas v. Strake*, 710 F.2d 190 (5th Cir.1983), the Court of Appeals upheld that provision as constitutional, over a sharp dissent.[4]

Another case awaiting argument on a grant of certiorari is *INS v. Lopez-Mendoza*, No. 83-491. In that case, the Court of Appeals for the Ninth

[3] On April 17, 1984, in *INS v. Delgado*, 466 U.S._____, 104 S.Ct. 1758, the Supreme Court reversed, holding that the INS practice of conducting "factory surveys" does not result in the seizure of the entire work force, and that individual brief questioning of the employees by INS agents concerning their citizenship does not amount to a detention or seizure under the Fourth Amendment.

[4] On May 30, 1984, in *Bernal v. Fainter*, 467 U.S._____, 104 S.Ct. 2312, the Court struck down the Texas statute as violative of the equal protection clause.

Circuit, sitting *en banc* (that means the entire court), ruled by a vote of 7 to 4 that the exclusionary rule applies in deportation proceedings. The exclusionary rule, as you all know, is the rule which states that evidence obtained by Government agents in violation of a person's Fourth Amendment rights cannot be used in Government proceedings against him. The Service takes the opposite view and the Board a few years ago suddenly went back on its prior decisions and held that the exclusionary rule does not apply in deportation proceedings because they are civil and not criminal. *Matter of Sandoval*, 17 I&N Dec. 70 (BIA 1979). In *Lopez-Mendoza*, the Ninth Circuit disagreed with the Board's holding that the exclusionary rule applies only in criminal proceedings, and it will be interesting to see what comes out of the Supreme Court. Again, I'll hazard a guess that the Supreme Court will reverse the Ninth Circuit, because even in criminal proceedings, the Supreme Court has been itching recently to modify or get rid of the exclusionary rule.[5]

Another important case involving aliens now before the Supreme Court is presented in *Longstaff v. INS*, No. 83-1229, petition for certiorari filed January 25, 1984. The case involves the exclusion of homosexuals. Now, these are not undocumented aliens, of course, but the principle involved cuts across the board. There is a conflict in circuits on this issue. The Ninth Circuit Court of Appeals held in *Hill v. INS*, 714 F.2d 1470 (1983), that when it comes to determining whether an alien is inadmissible as a sexual deviate, the decision can't be made just on the basis of the alien's own word. This is a medical determination and the statute requires a class "A" medical certificate from a medical officer. In *Matter of Longstaff*, 716 F.2d 1439 (5th Cir. 1983), the Fifth Circuit went the other way and construed the statute as permitting the determination to be made on any evidence available. Since there is a conflict in circuits and a good issue, the Court should grant certiorari.[6]

I'm running out of time, but I do want to mention one of the cases in the lower courts which has caused me to become a little skeptical about the course of future events in immigration cases. This is the case of *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984) (*en banc*), which will be elaborated on tomorrow by Debbie Anker. The Court of Appeals, sitting *en banc*, overrruled the decision of its 3-judge panel relating to the power of the INS to dispense with due process in exclusion proceedings. Actually, what was involved was a group of Haitians and as you all know the courts have been striking down various determiniations of the INS through the years when they have attempted to make haste at the expense of the aliens' rights to due process. This case involved a number of collateral rights and the 3-judge panel had held, in what seemed to me to be a very illuminating and irrefutable decision,

[5] On July 5, 1984, in *INS v. Lopez-Mendoza*, 468 U.S._____, 104 S.Ct. 3479, the Supreme Court in a 5 to 4 spilt reversed the Ninth Circuit and ruled that the exclusionary rule does not apply in deportation proceedings because they are civil in nature.

[6] On May 29, 1984, the Supreme Court denied certiorari, 467 U.S._____, 104 S.Ct. 2668.

that even though aliens don't have constitutional rights to due process when it comes to determining their admissibility, after they have been here physically and have applied for release on bond or parole, the question whether they should be released cannot be determined arbitrarily or capriciously, or on the basis of racial or nationality considerations. The Court of Appeals *en banc* said that's not so. When it comes to foreign affairs, the President and the Attorney General can discriminate on this basis, and since the aliens don't have any due process rights, they don't have the right to be informed in advance that they have the right to apply for asylum or the right to apply for parole.[7]

This is all I have time for. There are many other lower court cases which indicate that they are not abdicating their responsibilities. However, little by little there are signs that some of them are discouraged, as I am, at what is coming out of the Supreme Court. That's why I changed the title of my talk.

[7] The issue is before the Supreme Court in *Jean v. Nelson*, No. 84-5240. The Court granted certiorari on December 3, 1984, 469 U.S._____, 105 S.Ct. 563.

7

Extended Detention and Detention Facilities

AUSTIN T. FRAGOMEN, JR.*

Now I am going to make a few observations about detention of aliens. We've been addressing the topic of the apprehension of aliens and other law enforcement considerations, both from a sociologically oriented base and a strictly legal base. Now we will focus upon the next step in the process.

In attempting to analyze the basic rights of aliens one must bear in mind that this is an area in which there is a tremendous paucity of court opinion and of definitive standards. Attempting to pull together the basic principles is really quite different because so little has really evolved in this field.

The first distinction we have to make is between an alien who is subject to exclusion proceedings and one who is subject to deportation proceedings. Whether the alien is legally admitted or present in the U.S. without inspection, the fact that they are present in the U.S. accords to them a greater standard of due process than an alien in an exclusion proceeding.

With that distinction in mind, let's take a look at the power of the Immigration Service to detain aliens. In both exclusion and deportation proceedings there is no question that the Immigration Service has the authority to detain aliens. They have the authority to detain aliens from the time of initial apprehension through the hearing process and until the final order of deportation or exclusion and deportation has been executed.

The next issue is when they have actually apprehended the alien and have detained him/her, what is the responsibility or right of the alien to be released on bond. The law itself sets forth the right of aliens in deportation proceedings to be released on bail, but makes no mention of release on bail of aliens subject to exclusion proceedings. Therefore, we are presented with the threshold issue of whether aliens should be released when subject to exclusion proceedings. In the deportation context, it is well settled that an alien has the right to be released on bond, he has a right to a bond redetermination hearing, he has a right to an appeal therefrom, and the standards are fairly established.

* Adjunct Professor of Law, New York University School of Law and Brooklyn Law School, practicing attorney, Fried, Fragomen, Del Rey, Bernsen and O'Rourke.

The problem in the exclusion context emanates from the broad based plenary power of Congress to decide who can enter the U.S. As Maurice Roberts mentioned in his presentation, the recent decision of the 11th Circuit in *Jean v. Nelson*, reversing the prior decision of that particular court seems to have made the problem even more profound than many of us hoped it would be. The standard quotations referenced in court opinions such as *Jean v. Nelson* is the age-old language that whatever the procedure authorized by Congress is, it is due process as far as the alien is concerned. Of course, that refers to aliens in exclusion proceedings. That same concept carries through to their detention and their right to be released on bail. The quoted language comes from the *Mezei* decision which was the first case where the issue of whether an alien had a right to be released in an exclusion proceeding arose, was ever dealt with by the Supreme Court. In that case the court dealt in detail with this issue and enunciated the principle that aliens essentially have no rights, or at most, very minimal rights, in the exclusion context.

In the *Mezei* decision, the alien was detained on Ellis Island, the court holding that the alien hasn't entered the U.S., has virtually no rights at all, and has no right to be released on bail, no right to be paroled. The same theory seems to have been carried over to situations where the alien has been paroled into the U.S. under the recent decisions such as the 11th Circuit's *Jean v. Nelson*. What isn't quite as settled by these decisions is that once the Immigration Service determines that they will release aliens on bail in exclusion proceedings and they implement a de facto standard then the exercise of discretion is arguably subject to judicial review. But where the Immigration Service refuses to release any aliens on bail under any circumstances and does it uniformly, in exclusion situations the aliens have no right to be released.

The only ray of hope emanated from a dealing with the recent influx of the Cubans (*Fernandez v. Smith*) which recognized a constitutional right for an alien to be released on bail in a situation in which his exclusion from the U.S. cannot be effectuated. The Immigration Service cannot detain a person and thus penalize him solely because they are unable to effect his departure from the U.S. Of course, in a deportation context this is never really a critical issue because the statute makes it clear if you cannot effect the deportation of an alien within a period of six months he must be released from detention. However, in an exclusion context that is not the case and there the issue arises whether it would be necessary to release the alien on parole. The exclusion cases primarily arise in refugee situations. A rather unique situation exists with regard to the Cubans since their departure from the U.S. cannot be effected as opposed to the Haitians wherein they could be excluded and deported to Haiti, and the Haitian government would accept them. For awhile it appeared that two lines of cases, might develop. The one dealing with Cubans and the other dealing with Haitians, recognizing the difference in the social policy considerations. Unfortunately, the Court of Appeals

overruled the District Court in the *Fernandez* decision and reaffirmed the universal applicability of *Mezei*.

I should like to focus for a few minutes on an issue that I think on a practical level is more important, and that involves the Immigration Service's detention policy in general in terms of types of facilities, locations, access, and related issues. I am sure that any of you who have dealt with the Immigration Service particularly in various locations appreciate the fact that to the extent that there is a policy that fact is not readily manifest in what occurs. If you have an alien apprehended in one particular jurisdiction he may be detained at the Immigration Service itself or very close to the Immigration Service, perhaps at a fairly central location, in a situation where he is quite accessible and where legal counsel is available. On the other hand, the alien may be apprehended and taken somewhere that is fairly remote, inaccessible, and where legal representation is not available. Or possibly, even extreme examples as in the case of the Haitians where aliens were sent to points that are very remote and very inaccessible, and where there is virtually no legal representation possible. You have problems in some areas where there are no immigration facilities and, therefore, aliens are detained at normal criminal facilities. Sometimes you have a situation where the immigration facility is only available for males, and females are detained at criminal facilities, thus, subjecting them to types of searches and other indignities which would be inappropriate in an immigration context. You can have a problem with detention of minors, also, in that they are usually reluctant to detain minors at immigration detention facilities and tend to utilize state juvenile facilities. This is an area of law in which there has been very little judicial development and the parameters are not at all clear as to at what point immigration conduct becomes violative of basic rights.

It seems to me that there are a couple of overriding principles, the first of which is the basic concept of due process because there is no question that the detention of an alien must comply with basic dictates of due process. Essentially, we must weigh the governmental interest against the interest of the alien — to balance the two and arrive at a point at which we have a tenable situation with respect to both parties. A case that's quite interesting in analyzing these principles, although I understand the decision has been withdrawn, is *Nunez v. Bolden* which deals with a remote immigration detention facility where it was difficult for attorneys to access their clients and where there wasn't free legal representation available. The court held that it wasn't reasonable for the facility to restrict visiting hours during a particular time of day, but should have evening visiting hours or more flexible hours for attorneys. The facts of the case are not so important but rather the due process analysis. The court points out that you must strike a balance between the interests of the prisoner and the institution's interest in security and order, and, of course, that parallels the body of law in the

criminal area. Restrictions which are not reasonably related to orderly administration should not stand.

For instance, sometimes an alien is put in solitary confinement and when you ask the Immigration Service why he's in solitary confinement in an institution they will say, well, we don't have any immigration correctional institution so we had to put him/her in the state or county facility and we didn't want him/her to be with all these criminals so we put the alien in solitary confinement, to protect the alien so he/she would be happier there. It's a private room, I guess. But there are different ways you could look at that. The alien involved may not look upon being in solitary confinement as being a particularly desirable situation.

We have to take a look at the location of the facility with respect to attorney availability. Remote facilities present special problems. We have a big enough problem already with the inhibition and the restrictions of legal services representing undocumented aliens. I've never seen a case where a court has ordered the Immigration Service to close a facility because it was too remote and counsel was unavailable and, therefore, effectively denied legal representation to the alien community. But I would suggest it could be theoretically possible that a particular location would be so inappropriate that a court could reach such a conclusion.

Another issue which receives attention in the criminal context but rarely in the immigration context is exercise and recreational facilities. Detention of minors is also a very big problem in terms of what is appropriate. Not only the question of when minors should be detained in situations where you are detaining their parents, and essentially have no alternative but also what's appropriate under the circumstances. Detention of women is another area of great concern. Once again, the Immigration Service in many districts, New York being a good example, try to deal on a practical basis by virtually never detaining women. Regardless of the issue of whether the woman poses less of a risk in terms of absconding, the tendency would be to not detain the woman just because they know that they don't have any detention facility for the woman and that they have to put her in the women's criminal detention center. There, she'll be subject to strip searches and other types of activities which would be generally repugnant and secondly inappropriate for someone who's only a civil law violater. Of course, bear in mind that an overriding concern, and a fact which I think has received insufficient attention by the judiciary in immigration is one of the few areas where detention is permitted of a person who is not a criminal or a suspected criminal. An immigration violator has merely committed a civil law violation and in that sense, the questions of appropriateness of detention facilities as well as the standards for detention should be construed much more favorably to the detainee. Of course, the government has argued the contrary. They say these are just civil law violators subject to short term detention and, therefore, it's not necessary

to have exercise facilities. So, they take the civil law violator argument and they turn it around to diminish the legal rights of the alien. I say these are just civil law violators and if we're giving criminal law violators all these rights and all these facilities and benefits we should at least give the same to the persons who aren't even suspected of being criminals.

As you go through all these different considerations the important thought to bear in mind is the balance — the interests of the prinsoner in the institution and the institution's interest in security and order, the interests of the system you might say versus the rights of the individual. It's an area in which litigation is certainly necessary and judicial evolution will be the only way in which the standards will be properly set and the rules will be laid down. But in the meanwhile we have some unfortunate situations and I would urge each of you as it comes to your attention that in a particular location certain facilities are inadequate or certain policies render the effective advice of counsel meaningless that you consider litigating these questions.

8

Enforcing the Immigration Law: Now and After Simpson/Mazzoli

EDWIN HARWOOD*

THAT the Immigration and Naturalization Service (INS) confronts major problems in its efforts to enforce the Immigration and Nationality Act (INA) against violators is such common knowledge now that expressions like the "immigration crisis" or the "revolving door" at the southern border have become well established clichés. It is, of course, also one of the major reasons why the Simpson/Mazzoli Immigration Reform and Control Act is currently before the Congress. If Congress should finally approve the new bill, it will be the first major overhaul of immigration law in more than thirty years.

Although INS' published statistics reveal a dramatic increase in enforcement activity over the past two decades, legislators and immigration experts have come to realize that the available statistics tell us very little about how effectively the law is being enforced. Thus, the number of deportable aliens annually apprehended by INS has risen from 70,000 in 1960 to more than 1.2 million in 1983 — a seventeen fold increase.[1] Between 1961 and 1964, INS apprehensions held fairly steady within a range of approximately 85,000 to 93,000. Then, after Congress terminated the contract labor *(bracero)* program in the mid-60s, apprehensions began a gradually accelerating climb, reaching 212,000 by 1968, 345,000 by 1970, 505,000 by 1973 and topping one million by 1977. In 1983, more than one million of the 1.2 million arrests made that year were made on the southern border alone.[2] Furthermore, close to 98 percent of those arrested on the southern border were Mexican nationals. The dramatic surge in southern border apprehensions over the past two decades explains why Mexican nationals also account for the vast majority (94%) of INS' nationwide apprehensions. (Mexicans also account for most of the arrests made in the interior of the U.S. by the 900 plainclothes officers of

* Visiting Scholar, Hoover Institution, Stanford, California

[1] U.S. Department of Justice, Immigration and Naturalization Service, *1980 Statistical Yearbook*, Table 38, p. 85 and *Report of Deportable Aliens Found in the U.S.*, FY 1983, G-23.18 (Unpublished Table).

[2] *Ibid.*, pp. 85-86 and *Report of Deportable Aliens Found in the U.S.*, FY 1983, G-23.18 (Unpublished Table).

the Investigations Branch in the interior; however, they are a smaller percentage of all interior apprehensions [68% in FY 1983] than of nationwide arrests.)

Although Mexicans are believed by some scholars to account for about 50 percent to 70 percent of all deportable aliens in the U.S., they are disproportionately more likely to be apprehended than other-than-Mexican (OTM) aliens for two reasons. First, the Border Patrol has approximately 85 percent of its 2,800 agents stationed at the southern border, a larger number than the Investigations Branch has for the entire U.S. interior. Secondly, interrogations of Mexican aliens present officers with fewer legal problems in terms of meeting the Fourth Amendment reasonable suspicion requirement for interrogations and stops in the field. The "articulable facts" needed for a justifiable interrogation are more easily reached by officers in the case of illegal Mexican aliens.[3]

Many agents are quite candid in pointing out that their enforcement problem on the southern border began with the termination of the legal bracero program in 1964. That they have a point is clearly indicated by the statistics cited above.

But, though INS arrests have surged over the past twenty years, arrests are a poor proxy for the quality of enforcement activity viewed from the standpoint of deterrent effectiveness. Indeed, it is precisely because arrests have risen as a result of the dramatic increase in the influx of aliens entering without inspection (EWI) that, INS' ability to take more effective administrative action or even use criminal prosecution has diminished over the past two decades. For example, fewer than 1.4 percent of aliens ordered to leave the country (17,300 out of 1.18 million) were formally deported in 1983, a percentage that has declined steeply over the years. In 1960, deportations accounted for 12 percent of all aliens ordered to leave. By 1971, the percentage deported had dropped to 5 percent and by 1982, it had fallen to under 2 percent, its current level. In short, a larger percentage of aliens are returned under INS' voluntary return program.[4]

In the case of Mexican nationals, this means that most are simply returned directly to Mexican Customs, often close to their points of entry. Most are not fingerprinted and there is no Service record other than the I-213 arrest form which the arresting patrol agent or investigator fills out and which is filed in the local Border Patrol station or district office. Many aliens give an alias

[3] For a more detailed treatment of this issue, *see*, Edwin Harwood, "Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement", *University of California, Davis Law Review*, Vol. 17, February, 1984, pp. 507-550.

[4] In the case of Mexicans, this is carried out through the I-274 return under safeguard program. Many Central Americans are also returned under safeguard by air. In the case of other overseas aliens, many agree to accept I-210 voluntary departure, though they do not leave under INS safeguard.

rather than their true name, usually to prevent their recognition by agents as repeat violators.

By contrast, 20 years ago, most apprehended aliens were routinely fingerprinted and held in detention pending receipt of an FBI fingerprint check. Repeat violators were apt to be repatriated into the Mexican interior. They had a higher risk of being deported back then and criminal proceedings were sometimes instituted against those who had entered without inspection, a misdemeanor offense for the first conviction and a felony offense for subsequent convictions. Today, in contrast, criminal prosecution is reversed almost exclusively for alien smugglers or other serious INA violators, *e.g.*, arrangers of sham marriages between aliens and citizens, document counterfeiters, *etc.*

Not surprisingly, when enforcement caseloads rise steeply in relation to the resources available to handle them, something must give, lest the organizational tissues be damaged. What has had to "give" is the stringency with which the law can be enforced. In consequence, not only are criminal prosecutions rarely used against most INA violators, but even the civil action of formal deportation must also be used sparingly. With only 60 immigration judges nationwide and no more than approximately 2000 INS detention spaces, deportation has become an increasingly selective enforcement tool.

In the first place, deportation hearings must be granted to all aliens who insist on having a hearing because this is a statutory right for any individual who has made an "entry" whether legally or illegally. Aliens who request hearings usually do so either because they believe they might qualify for relief under the Immigration and Nationality Act or because, though they have no immigration equities, they believe they can gain additional time to remain in the U.S. Since those who demand hearings must be accommodated, most other aliens must be diverted from formal hearings. This can only be achieved by inducing them to accept the lenient discretionary action of voluntary return: under safeguard (I-274 program), in the case of Mexicans or voluntary departure (I-210), in the case of violators from overseas.

Still, deportation processing is used as a sanction by INS in some cases. In the first place, some aliens are statutorily ineligible for voluntary return because they have been convicted of crimes involving moral turpitude or because they were previously deported. Also, a small percentage of aliens who would have accepted voluntary return if it had been granted will, nonetheless, be processed for deportation because INS officers consider their behavior at the time of arrest sufficiently serious to warrant deportation processing. Thus, aliens who try to evade apprehension by making false claims to citizenship (and who persist for an extended period with their bluff or use fraudulent birth certificates to back up the claim), along with those who are troublemakers will often be "written up" for deportation processing. Occasionally, aliens recognized as repeat violators will be processed for

deportation — *e.g.*, an alien who has been caught crossing at the same point two or three times within the month. Unlike voluntary return, an alien who is officially deported acquires a Servicewide file and Alien Registration number, is fingerprinted and will be liable to prosecution for the 8 U.S.C. 1326 felony of re-entry should he/she subsequently be reapprehended.

In short, what INS must do is offer the typical EWI violator the most generous "deal" it can make, namely, to accept voluntary return. It is generous because it has none of the liabilities of deportation processing. Also, the alien will not have to spend 5 to 10 days in detention awaiting his/her hearing if he/she is unable to post the bond, which most Mexican EWIs either cannot or will not post. Many Mexicans anticipate that they can get back their jobs in the U.S. sooner than that!

On the other hand, it would be a mistake to exaggerate this situation. Although the sanctions imposed against administrative violators, a category that includes aliens caught entering without inspection along with overseas aliens who abuse their visas by overstaying or working without authorization, have become milder over the years, there is still teeth in the law. INS and its parent agency, the Department of Justice, will "go to the wall" against INA violators who are considered serious, among them: naturalized citizens who downplayed their involvement in Nazi atrocities when they applied for visas years ago, principals in alien smuggling or document counterfeiting rings, arrangers of sham marriages, aliens involved in serious criminal activity and aliens who perpetrate blatant frauds against the government. This is eminently rational as a policy. With limited resources, it makes more sense to expend resources on those aliens who can be judged to pose the most serious threat or problem for the society or who induce others to violate the law for gain.

In contrast with the enforcement mission of the Border Patrol, whose "bread and butter" consists of alienage and deportability checks on linewatch, roving highway patrols and on farms and ranches, the mission of the Investigation branch in the interior includes case investigations arising from alien benefit and relief petitions as well as the pursuit of INA violators through employer surveys or other leads. During the early 1980s, investigators in many busy district offices gave these "dual action" cases (as they were called) clear priority. The reason was simple: aliens with pending benefit applications want prompt adjudication of their requests. Those with attorneys may go into the Federal District Court and get writs of mandamus issued against the District Director if adjudication of their petitions is delayed. By contrast, aliens living or working illegally in the U.S. are usually in no rush to be apprehended.

For example, an Investigations supervisor in one district I visited during the course of my field work in 1982 told me that his officers conducted surveys of businesses suspected of employing illegal alien workers a couple of times each

month, "to show the flag", as he put it. He believed Area Control had to be done occasionally so that the illegal population would at least be "looking over its shoulder". But with just 20 to 40 Area Control apprehensions a month, he knew that the deterrent impact was small.[5] With just 8 to 10 investigators, his unit had to give priority to dual action investigations because helping the Examinations and Naturalization branches clear their backlogs was the District Director's priority.

Nor was available investigative manpower the only constraint. In addition, detention space was extremely limited in this particular district. If too many of those apprehended could not come up with the required Service bond pending their hearings, then, they might have to be released on their own recognizance because of the scarcity of available detention space. But if aliens without equities were to be released on OR, then, word might get back through the grapevine and the district office would have trouble getting aliens to post even the minimum Service bond of $500.

In effect, resource bottlenecks — the number of immigration judges available for hearings, available detention space and funds for alien travel, available officer time to make apprehensions and handle paperwork processing —had become the primary obstacles to effective enforcement against administrative violators in the interior.

But the problems INS faces in interior enforcement arise not just from internal organizational pressures, *e.g.*, inadequate resources or the need to give "dual action" benefit investigations priority because aliens are awaiting adjudicatory outcomes. Constraints are also imposed by the political and social milieu in which the agency must operate.

Interior arrests of administrative violators are much more politically troublesome for INS than border arrests because illegal aliens who have managed to settle into the interior often have friends and relatives who will come to their defense. Also, legal rights and other activist organizations can be mobilized on behalf of the illegal alien community and can harass INS through civil lawsuits as well as pressure on politicians. Although the public at large supported Area Control arrests at worksites during the early 1980s, this support was largely passive. What counts politically is organized lobbying and there is much less active organized support for INS enforcement by comparison with the organized and highly vocal antagonism directed against INS enforcement by groups sympathetic to aliens — a phenomenon some INS officers refer to as the "statute of liberty syndrome".[6]

[5] In July, 1983, the Investigations Branch implemented a new "case management system" for interior investigations. The term "area control" is no longer used. Though "employer surveys" are still conducted, the emphasis is now on deterring "notorious employers" of illegal aliens through repeat surveys rather than seeking to maximize the number of apprehensions.

[6] *See*, Edwin Harwood, "Alienation: American Attitudes Towards Immigration", *Public Opinion*, June/July, pp. 49-51; also, Harwood, "INS and the American Public: What Each Needs to Know About the Other", *INS Reporter*, Spring, 1983, pp. 10-13.

The reason may be that the benefits of interior apprehensions to most Americans are trivial on a per capita basis. Aside from the question of whether illegal aliens impose net costs (or constitute a net gain) for our society, the only individuals who are apt to view themselves as the direct beneficiaries of Area Control arrests are the lone citizens or lawful residents who phone in the tips that often initiate a business survey. In many cases, the informant calls INS because he or she has a personal motive. He or she may have been fired from the job and wanted to get even with the employer. The fact that illegals were working at the plant never bothered the informant until he or she was personally laid off.

To summarize: INS officials feel an obligation to enforce the provisions of the INA to the fullest extent possible. However, enforcement policy at both the macro level (the allocation of resources servicewide as well as the setting of major allocational priorities) and the micro level (enforcement targeting decisions by field officers and their supervisors) is constrained by the need to husband political capital and public goodwill as well as by the need to maintain equilibrium between resources and caseloads. Legally, INS could obtain warrants to search churches for aliens being harbored in violation of the law but, the political costs of doing so would be exorbitant in relation to the gains in arrests or prosecutions. The same applies to "shotgunning" on residential streets. Legally, INS officers could work residential streets because streets are public areas but, the political costs (as well as the possibility that officers might pursue aliens into apartment houses) are judged to be unacceptable risks. Thus, INS policy is often more restrictive than the bounds set by law.

How might the current enforcement situation change in the event the Simpson/Mazzoli bill were to pass?

Though it is always hazardous to try to predict the future, it is possible to develop scenarios of what might happen under a new set of conditions. In effect, we can extrapolate based on our knowledge of INS' current problems by making reasonable assumptions about the effects which follow from changes introduced by new legislation. But it should be kept in mind that a plausible scenario is by no means a certain outcome.

First, looking at the southern border situation at the present time, it is clear that enforcement achieves little in the way of effective deterrence. Patrol agents know and candidly state that the "Odds favor the determined alien". If the border were to be appreciably tightened — for example, by adding another 2000 or 3000 agents, arrests would certainly increase.[7] The most probable impact is that the "unofficial tariff" for entry would increase. More

[7] INS estimates that addding an additional eight hundred and fifty patrol agents would increase apprehensions by approximately four hundred and sixty thousand. Immigration and Naturalization Service, FY 1985 Authorization and Budget Request for the Congress, January 20, 1984, p. 17.

aliens would use smugglers; smuggling fees might rise; perhaps more attempts would be required on the average before an alien succeeded in eluding the linewatch screen. Conceivably, if the tariff rose high enough, fewer aliens would attempt entry.

But by the same token, a tightened border could have perverse consequences for interior enforcement. The system is in equilibrium now because almost all apprehended Mexicans, especially males without equities, accept voluntary return. If entry costs rose, however, the incentives might shift. More Mexican EWIs might begin to demand deportation hearings. If too many did, the required Service bond would probably have to fall in order to maintain equilibrium between available detention space and the number of apprehended aliens who would have to be accommodated. If the bond fell to $500, a level that begins to approximate smuggling fees and other expenses of entry, then, demand for a hearing becomes competitive with voluntary return. The hazard of such outcome is that because of the large numbers of Mexican EWIs, it would not take a very large shift in the percentage of Mexicans demanding hearings to do severe damage to the enforcement and adjudicatory apparatus. Would Congress and the public agree to the establishment of new and larger detention centers along with the costs of their operation?

In the debate over Simpson/Mazzoli, not much thought has been paid to the central theoretical issue, namely, the way in which equilibrium between caseloads and resources has been maintained in recent years — in large part because there has been so little research on how INS operates.

The proposed Simpson/Mazzoli bill is flawed because it makes assumptions whose premises were not well researched at the time the bill was drafted. It proposes two major "control" features. First, the border is to be tightened through increases in the Border Patrol. Secondly,civil and criminal penalties for employers caught hiring illegal aliens will, the bill's sponsors hope, "turn off the magnet" to future illegal entry.

Though these proposals were supported by the Hesburgh Select Commission on Immigration and Refugee Policy in its 1981 report to the President and Congress, SCIRP's recommendations in turn rested on staff reports and studies by specialists which in the main had little to say about either INS operations or the likely deterrent impact of employer sanctions. (David North's paper, "Enforcing the Immigration Law: A Review of the Options" was the outstanding exception.)

Interestingly, in 1981 the Hesburgh Select Commission on Immigration and Refugee Policy (SCIRP) recommended to Congress that it legislate fines for employers who knowingly employ illegal aliens or fail to verify their immigration status; however, the supporting staff reports had almost nothing to say about the effectiveness with which regulatory agencies are able to achieve employer compliance through civil and criminal actions.

Sparse coverage of this issue appears in a few pages of one SCIRP appendix.

It dealt with the Department of Labor's Employment Standards Administration effort to crack down on labor law violations in industries employing illegal aliens. Many violations were turned up among the marginal employers of illegals despite the fact that the Fair Labor Standards Act has been in force for many years. Although over one million dollars in fines were levied in 1979 against several hundred farm labor contractors who are prohibited from using illegal farm workers, the fines, the report noted, were hard to collect because of the transiency of the contractors.

The problem with trying to move INS in the direction of employer centered enforcement is the very different regulatory environment that INS is apt to encounter, compared with the federal agencies that do have muscle, *e.g.*, EPA, OSHA, FDA, etc. Unlike carcinogens in food products or toxic chemical waste, whose control the public overwhemingly supports, illegal aliens are people. As Eugene Bardach and Robert Kagan (*Going by the Book*) note, many public watchdog groups will go to court to force the EPA and other agencies to take a tougher enforcement stance against businesses. But in the immigration area, the most vocal activists go to court to get INS to ease up on its enforcement against illegal aliens and their employers through suits charging unconstitutional enforcement actions.

One might think the unions would supply the political constituency for post-passage monitoring of Simpson/Mazzoli. However, the unions in those sectors employing many illegals are often sympathetic towards them — perhaps because many are now dues paying members. The unions having the most political clout are in industries where illegal aliens are less of a problem and they have other priorities in any case.

Even if Congress funds INS or the Department of Labor's Employment Standards Administration sufficiently well to make employer sanctions work, which might require an OSHA sized inspections' force of 2000 to 3000 officials, it might soon turn with a vengence on its new creation as political opposition from small businesses and pro-illegal alien lobbyists mounts. Unless fines are stiff and easily gotten without costly litigation by INS, they can be absorbed as a part of normal overhead. However, stiff fines that might drive marginal businesses out of business will cause political trouble, just as prosecutions of upstanding ranchers caught aiding and abetting smugglers currently do.

When the Treasury's Bureau of Alcohol, Tobacco and Firearms sought to monitor compliance by gun dealers with the gun sales registration laws passed in the 60s, few of the numerous dealers found to be out of compliance lost their licenses.

Secondly, because aliens, unlike carcinogens or polluting smokestacks, are people, they can develop ways to circumvent the system regardless of whether employers seek to comply or not. Many will get whatever documents they need to meet an employer's verification requirement, thus boosting business

for the counterfeiters. Not being competent to test immigration status claims, employers who want to comply and are suspicious about the documents presented might start calling INS for checks. If tens of thousands of calls come tumbling in, INS will have to explain that it hasn't the manpower to check any but a fraction. Employers will be told to xerox copies of each worker's ID in the event somebody comes around to check someday. Thus, the hoped for leverage of having employers screen out illegals will evaporate it too many illegals appear with fraudulent documents.

Unlike OSHA, where the management is expected to eliminate a worksite hazard in advance and can be issued a citation (and fine) if an inspector arrives and spots it, employers are not required to know who is truly an alien authorized to work. All they are required to do is check and photocopy a worker's ID. It is hard to justify penalties of thousands of dollars for bookkeeping oversights.

Although INS realizes that, with limited resources, it must enforce employer sanctions selectively, mainly against "notorious violators", the name of the game is general deterrence if, as Simpson/Mazzoli's supporters hope, the "magnet" to illegal entry is to be turned off. No doubt some flagrant violators will finally be driven to employ authorized workers as civil fines begin to mount. But the illegals may move to other firms, or, the marginal firms being targeted may simply relocate. Though a firm like GM cannot go underground, it is unlikely to have enough illegals to warrant persistent INS monitoring.

Besides the fact that the general deterrent effectiveness of administrative sanctions has not been well researched, the matter is complicated by the fact that employers may comply with federal regulations for various reasons other than the threat of penalties. Thus, compliance with OSHA standards may mitigate damages in a court action brought by an injured worker. Large and publicly visible companies may comply with EPA regulations because executive careers can be damaged by press *exposés* of toxic waste dumping, which will signal poor managerial controls to stockholders and the public. But, in the case of the largely marginal companies employing most illegal aliens, it is less clear that concern over bad publicity would have the same effect.

If Congress wants a symbolic and token enforcement effort of employer sanctions, which may be the only kind that is politically acceptable, well and good. But none should be deceived if it fails to "turn off the magnet".

Part III

Refugees: Policy and Legal Developments

9

Shifts in Refugee Programs: Overseas Assistance vs. Admissions

JAMES N. PURCELL, JR.*

THE refugee crises of the second half of the 1970s posed an immense challenge to the international community and to the U.S. in particular. The takeover of the Indochinese countries by Communist regimes, the expulsion of thousands of Cubans by the Castro regime, the invasion of Afghanistan by the Soviet Union, the Ogaden War in the Horn of Africa and the upheaval in Iran all created large numbers of refugees. The refugee crises we had to deal with as a result of these events have been largely overcome and we are now faced with situations where regional solutions to refugee problems can be more aggressively explored.

I would like to talk about refugee assistance versus admissions because these are the basic alternatives facing the international community and the U.S. refugee program during the next few years.

The changing composition of the refugee population in the world today, and U.S. policy decisions, have brought about a reduction in refugee admissions to the U.S.. At the same time, we are continuing to provide strong support for the assistance needs of refugees through contributions to international organizations and private voluntary agencies. We have also been actively encouraging other traditional refugee receiving states to contribute more generously to refugee assistance programs and to take their fair share of the refugees who must be resettled. A graphic illustration of the shift in U.S. refugee programs from admissions to assistance can be seen in the change in the last few years in the level of funding of these two functions. Four years ago, two-thirds of the funding in our appropriation was used for admissions to the U.S. and only one-third for assistance to refugees abroad. Since then, funding levels have been basically reversed. Our FY 1985 budget request calls for $196.3 million for assistance and $117.3 million for admissions programs.

The largest single item under this heading is $67 million for assistance to Palestinian refugees through the U.N. Relief and Works Agency (UNRWA). The approximately two million Palestinian refugees in the Middle East

* Director, Bureau for Refugee Programs, U.S. Department of State.

registered with UNRWA constitute the longest continuous refugee problem we have had to deal with. Our assistance to this refugee population supports U.S. efforts for peace in the Middle East while answering a real humanitarian need. Only a settlement of the Arab-Israeli dispute appears likely to resolve this refugee situation.

We are requesting $54.5 million for assistance to refugees in Africa. The African nations have historically provided asylum to neighboring populations fleeing civil strife and natural disasters. Here again, the primary requirement is for care and maintenance assistance, not resettlement in the U.S.. Together with the UNHCR and the African nations themselves, the U.S. is working toward finding permanent solutions for the refugee problems created by the political and social conditions in Ethiopia, Uganda, South Africa and some of the other countries of Africa. The upcoming International Conference on Assistance to Refugees in Africa (ICARA II), in which the U.S. will participate, will provide an opportunity to spotlight the urgent assistance needs of the approximately two million refugees on that continent.

Next on the list of assistance programs in terms of funding is the request for $26 million to assist Afghan refugees in Pakistan. Some 2.9 million Afghans have registered with the Government of Pakistan as refugees. U.S. assistance funds are channeled through the UNHCR, the ICRC and a number of private voluntary agencies. In addition, the U.S. will provide food aid to Afghan refugees through the World Food Program of the United Nations. The generosity of the Pakistani Government in providing asylum to the Afghan refugees has greatly eased the burden on the world community of this enormous refugee population. Most of these refugees are tribal agriculturalists who are determined to return to Afghanistan some day and, therefore, resettlement outside the area is not generally desired. Pending a settlement of the internal political strife in Afghanistan and the withdrawal of Soviet forces from that country, we must continue to provide a relatively high level of assistance to the Afghan population living in the Pakistani borderlands.

Finally, we have requested $15.0 million for assistance to refugees in Latin America. Although the number of refugees is small — approximately 150,000 according to UNHCR estimates — the proximity of the area to the U.S. and our deep interest in developments in Central America, warrant a relatively high level of assistance. In almost all cases, refugees have been granted asylum by neighboring states pending a resolution of the conflicts in their home countries, and resettlement outside the area has not been necessary.

The regions which we have looked at so far — the Middle East, Africa, South Asia and Latin America — contain the vast bulk of the world's refugees, approximately 7.3 million out of a total refugee population of 7.7 million in the world today. As I have noted, in these regions and for all but a few of these refugees, assistance through international organizations and

private voluntary agencies is the proper role for the U.S. to play. Where, then, does admissions fit into the picture of U.S. refugee policy?

For Fiscal year 1985, the Department of State will request a worldwide ceiling of 72,000 for the resettlement of refugees in the U.S.. This is the same ceiling we requested in FY 1984. And as in FY 1984, 50,000 of these numbers are intended for refugees from East Asia, with 22,000 for refugees from the other geographic areas. We are continuing to work closely with the governments of the first asylum countries in Southeast Asia in the international effort to resettle those refugees who require resettlement. Combined with the admissions opportunities provided by other major resettlement countries such as France, Australia and Canada, this level of U.S. admissions should greatly reduce the first asylum burden on the countries of Southeast Asia, which have acted as hosts to thousands of refugees from Indochina. In addition, I believe that the 22,000 remaining numbers will provide adequately for those refugees from other regions who require resettlement in the U.S.. The proposed ceilings for those regions are: Near East and South Asia: 6,000; Eastern Europe and the Soviet Union: 12,000; Africa: 3,000; and, Latin America and the Caribbean: 1,000.

Indeed, only some 5 percent of those migrating to the U.S. every year are legal refugees; the remainder are immigrants and illegal migrants. While the number of refugees needing assistance remains great, those requiring resettlement in countries far from their native lands has been steadily reduced. I want to stress that this situation is "normal" in that it reflects the overcoming of a series of emergencies which hit the U.S. and other resettlement countries in the 1970s. We are not "closing the doors" to refugees. We are reacting for the most part to the changing nature of the refugee problem in the world and, in particular, to the diminished flow of refugees from Indochina. In this current period, the appropriate response is more often assistance than admissions.

While the world refugee situation has stabilized, two problem areas remain which I would like to address: first, the need to afford better protection to those refugees who have not yet found safety and security; second, the need to bring under greater control the crisis which has existed in Southeast Asia since 1975.

The U.N. High Commisioner for Refugees issued a report in August 1983 calling the international community's attention to the urgent need to provide better protection to persons fleeing from oppression. The High Commissioner's "Note on International Protection" pointed out that not only were countries taking a more restrictive position on legal protection, but, in some instances, the physical protection situation of refugees had also worsened.

The provision of legal protection to refugees has been complicated by the debate over whether many asylum seekers are, in fact, "economic migrants" who have no fears of persecution in their countries of origin. Indicative of the

hardening attitude toward granting asylum is the new Swiss law on asylum due to take effect on April 1. This law, a revision of the liberal 1981 asylum statute, will deny work permits to asylum applicants and will allow only a single appeal in cases where asylum is refused.

Previously, asylum applicants were granted permission to work while their cases were pending and could file two appeals. Asylum applications which the authorities consider groundless can be denied without granting the applicant a personal interview. It is ironic that in Switzerland, the headquarters country of the U.N. High Commissioner for Refugees, the government should be taking measures to reduce the number of persons granted asylum. I mention the Swiss case only as an illustration of a wider phenomenon among the economically hard-pressed and developed countries. We can hardly be smug about this issue. Here in the U.S., we too are faced with increasingly difficult decisions about who should be granted asylum. There is no easy answer to this dilemna.

While the legal protection question is troublesome, the physical protection problem is truly alarming. The savage pirate attacks on boat people in the waters south of Vietnam, and the armed attacks on refugee camps on the Thai-Kampuchean border and in Lebanon are the most dramatic examples of the physical protection problem. Together with the UNHCR and the other donor nations, we are working with Thailand to find ways in which the anti-piracy campaign in the Gulf of Thailand can be made more effective. During 1983, the UNCHR estimates that forty percent of the boats carrying escapees from Vietnam were attacked by pirates. The figures of the number of people killed, raped and left to die at sea are truly horrifying. It is imperative that a vigorous anti-piracy program stop this mayhem as soon as possible.

A related area in which efforts at physical protection are needed is the rescue at sea of boat people. UNHCR figures show that in 1980, 20 percent of all Vietnamese refugees arriving in Southeast Asian refugee camps had been picked up by ships traversing the South China Sea. In 1983, this figure had dropped to 12 percent. Various reasons have been advanced to account for this decline, but, it is clear that, to a great extent, boat people are being passed up because ship captains fear they will not be able to disembark the refugees at the next port of call and will be forced to incur considerable expense for their upkeep until some country agrees to accept them. Here again, together with UNCHR, the U.S. is actively engaged in educating shipping organizations and ships' masters about the procedure for handling persons embarked at sea. For this procedure to work, however,, there must be ready resettlement offers for such people. Unfortunately, the number of such resettlement offers has decreased.

The other area of concern which I mentioned is how to gain greater control over the international resettlement effort for Indochinese refugees. Here also, we are faced with some difficult protection issues. Countries of first asylum in

Southeast Asia have reacted to many of the more recent arrivals from Indochina by instituting, in some instances, a policy of "humane deterrence". The use of closed camps, in which persons are not permitted to have contact with the UNCHR and, in which "austere" living conditions are imposed in order to discourage additional migrants, poses questions which concern us all.

We in the U.S. refugee program are faced with the question of how to deal with the so-called "Priority Six" refugees from Indochina, those who have no identifiable ties to the U.S. but who satisfy the definition of a refugee under U.S. law. Do we agree to accept such people for resettlement in the U.S.? If so, can we be assured that other countries will take their fair share of the refugees remaining in countries of first asylum? I believe that, through a policy of discouraging additional clandestine flight from Vietnam by expanding the UNCHR's "Orderly Departure Program" and, through continued international cooperation in resettling the remaining refugees in first asylum, the Indochinese refugee problem can be largely contained in the next few years.

Despite these troublesome issues of protection and resettlement, I think we can look with some satisfaction on the current state of the U.S. refugee program. We have responded generously to appeals for assistance to refugees in Africa, the Middle East, South Asia and Latin America. We are working with the UNHCR and other resettlement countries to expand the Orderly Departure Program from Vietnam, which hopefully will provide a safe means of exit from that country and thereby end the phenomenon of the boat people, with all its attendant problems — particularly the scourge of pirate attacks. I am certain that, as we move into the 1980s, the U.S. will continue to provide leadership to the international community in safeguarding the interests of refugees. Although the mix between admissions and assistance may change, it will, in no way, signal a slackening of our dedication to this vitally important task.

10

Early Warning of Forced Migration

LEON GORDENKER*

EARLY warning has become a current phrase in some governmental bureaucracies and has entered the lexicon of those who work at humanitarian service. Ironically, in view of the aims of the latter group of users, the term appears to have seeped out of military thought sometime during the late stages of the Second World War. Currently, it seems to have at least the following meanings, depending on the organizational milieu:

- defense by nuclear preemption against a military attack employing nuclear weapons;
- giving timely notice of an impending world crisis in the supply of foodstuffs;
- anticipating harmful use of specific drugs;
- forecasting bank failures; and
- making ready for relief of forced migrants or preventing forced migrations by reducing impelling causes.

Whatever the phrase may mean to specific users, it needs clarification, especially for use in connection with refugees.

Early warning, as the term is used here, has to do with information and its distribution. It implies the communication of symbols, not the distribution of material goods or the transportation of persons or similar tangible attributes. It can be assumed that information concerning forced migration emanates from and is consumed in a purposive way by organizations, including governments and their creatures, and by private voluntary organizations. Furthermore, early warning in most of its appearances seems to mean use of information to evoke active responses from organizations in pursuit of a set goal. Finally, it is assumed here that information conceivably can be obtained in appropriate quantity and quality for effective use.

Four questions can be posed to fill out the notion of early warning with regard to refugee or other unplanned mass migration. These are:

1. Of what is a warning issued?

* Center of International Studies, Princeton University.

2. When is a warning issued?
3. To whom is it issued?
4. By whom is it issued?

An ancillary and implicit set of questions concerns what reactions to early warnings are sought, expected and rejected and, how these reactions relate to each other.

OF WHAT IS A WARNING ISSUED?

Refugees and persons who believe themselves forced to depart from their homes constitute only part of the total of transnational migrants. The element of coercion that produces refugees and mass exoduses distinguishes their situation. It has had special treatment under international law, in international practice and in the creation of institutions at both the international and national level. But large-scale forced or fear-dictated movements of people do not necessarily produce refugees in the sense defined in international law.[1] Some movements of a few people consist entirely of refugees, while others may not include any or few refugees in the legal sense. But all concerned may be subject to the same physical, social, moral and legal deprivations.

Early warning ought to concern itself with movements of people who are subjected to severe deprivations that they could not avoid and did not themselves cause.

WHEN IS A WARNING ISSUED?

Timing of a warning relates to its purpose. Two main purposes are as follows: 1) to provide time to those in authority, or in position to influence, to prevent severe, unavoidable, undeserved deprivations that cause fearful or forced movement; 2) to organize efficiently the relief and protection of people who have been actually forced to move or who soon will flee.

Prevention — the prevention of forced movement of people falls within the category of actions that most observers would no doubt call political. Governments usually execute or are implicated in the persecutions that cause the refugees covered by the United Nations Convention on Refugees.[2] Specific

[1] The most widely accepted definition of a "refugee" is that of the United Nations Convention Relating to the Status of Refugees, UN Treaty Series No. 2545, Vol. 189, p. 137: "...any person who...owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country..." it obviously concentrates on victims of political and social persecution, not on those who believe themselves forced to flee because of other pressures.

[2] This also is implied by the emphasis in the UN Convention and the Statute of the UN High Commissioner on protection of refugees and, from the intergovernmental character of the legal

refugee-like situations to which the UN General Assembly directs the attention of the High Commissioner for Refugees invariably involve what governments do or fail to do.[3] These are political matters.

Prince Sadruddin Aga Khan and others attribute most refugee situations — or forced migrations generally — to the refusal by authorities to give effect to human rights.[4] Sometimes, active denial of human rights results in mass or individual exodus. Sometimes, the reduction of rights enjoyed earlier is a cause. Sometimes, the long-term incompetence of governments, as well as continuing malevolence, results in deprivation of rights. Sometimes, active denial of human rights results in mass or individual exodus. Sometimes, the reduction of rights enjoyed earlier is a cause. Sometimes, the long-term incompetence of governments, as well as continuing malevolence, results in deprivations of rights.

If deprivation of human rights is narrowly understood, then war or domestic insurrection would be excluded as relevant to this argument. Such an exclusion seems arbitrary and unjustified. Fighting denies rights to indivudals who are innocently involved. It is a principal cause of forced migration. It should, therefore, be included among the deprivations of human rights relevant to exoduses. The clauses of the Geneva Conventions dealing with civilian victims of war support this line of reasoning.[5]

Whether a broad or narrow view of violations of human rights as a cause of forced migration is adopted, it is clear that governmental authorities, or social groups which are the responsibility of governments, cause forced migrations. These are man-made, not natural disasters. Moreover, such actions can be measured against an extant standard. It is established in a growing body of international law, including the UN Convention of Refugees, the Covenants on Human Rights, regional agreements on protection of human rights, (including those of Europe and Latin America) and such devices as the Helsinki Declaration. Even when governments have no share in a persecutory action by a social group in its jurisdiction, governmental measures usually would be required to stop a rights-violating campaign.

Where significant violations of human rights take place, then, an early warning of forced migration may be possible. How significant the violation

provisions for refugees. The Statute is contained in UN General Assembly Resolution 428 (v), Dec. 14, 1950.

[3] For a complete collection of these many resolutions, *See*, UN Document HCR/INF/48, Rev. 2 and addenda.

[4] *See*, UN Document E/CN 4/1503, Dec. 31, 1981, "Study on Human Rights and Mass Exodus: Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories".

[5] Geneva Conventions of 12 August 1949, and Protocols Additional to the Geneva Conventions of 12 August 1949, 10 June 1977.

would have to be and how significant the flow probably would depend on immediate circumstances. Of special importance is the degree to which a government may be implicated, either by encouraging persecution or failing to act against it.

It is also conceivable that indications of impending mass movements could systematically be assembled at an even earlier stage. Forecasts could perhaps be made on the basis of indicators based on continued actions performed in the immediate past, violations of rights great enough to cause people to flee.

These indicators would include such factors as changes of governments which establish new elites intent on depriving persons of their rights; the installation of governmental systems that inherently imply disregard of human rights; the forcible displacement of elites by others of similar programmatic cast; the use of minorities as scapegoats; changes in once-benign public attitudes toward the application of human rights; and even deeper, ecological factors such as: the irresponsible depletion of forests, heedless increases in population or, progressive dessication of fertile areas. Even such background factors as the latter relate to the ability of a polity to extend economic and social rights of the sort set forth in the UN Covenant on Economic and Social Rights.[6]

Relief — the timing of early warning directed at increasing the effectiveness of relief efforts in emergency or crisis settings would differ from those aimed at prevention of forced migration. Early warning for this purpose would encourage the preparation and initial applications of measures to provide protection and relief to the people concerned. It would activate governmental and social institutions so that their operations would contribute to the protection and relief functions. It would call forth governmental and executive decisions for this purpose. In short, it would increase the efficiency of relief and protection by eliminating the time-gap between the appearance of forced migrants and the actual delivery of necessary services to give them shelter, food, medical care and legal protection.

Early warning of forced movement could take place while the persons involved were still within the national boundaries of the states of their origin. They might then have a close or distant, national or foreign, destination. The more certain the information on their movements, the more focused could be the responses of organizations that were prepared to offer help. Relief

[6] UN General Assembly Resolution 2200 A (XXI), Dec. 16, 1966; entered into force for ratifying states on Jan. 3, 1976. Although this Covenant applies to the behavior of governments and does not directly attempt to guarantee the rights of individuals and, moreover, is treated as a set of aspirations to be achieved at some future time, it nevertheless, does set out a standard of conduct that never before has attracted so much formal accession.

operations include a vast repertory of organizational forms and experiences. In contrast with prevention of forced migration, rich institutional resources are available, even if they may be strained by individual incidents involving large numbers of people or special hardships. Moreover, protection of refugees, while perhaps never satisfactory, enjoys both a relatively clear legal basis and extensive practice.

From the point of view of the producing government or groups, however, early warning at the stage when relief and protection will soon be or already is required might be taken as interfering and contemptuous. As with violations of human rights that may lead to forced migrations, early warning intended to increase the efficiency of protective and relief efforts may often be understood as political, not disinterestedly humanitarian.

TO WHOM IS A WARNING ISSUED?

If the main intention of a warning is prevention, it may be issued, whether openly or discretely, to all institutions and persons involved in causing or preventing a flow of forced migrants. If the main intention is efficient response, the warning would go to those institutions and groups expected to react. In many instances, warnings would be issued both to those who caused forced migrations and those who assist the victims. Depending on the aim of the warning then, it would be issued selectively to the following:

1. Governments, as the main managers of large-scale social actions and because of their actual or putative coercive abilities in extraordinary preventive efforts. Some highly influential governments would always have to be involved directly in preventive measures or indirectly through other organizations. Not all governments necessarily would have to receive every warning.
2. Intergovernmental bodies. These would sometimes intervene as third parties in both prevention and response. The Security Council, the General Assembly, the Council of Europe, the regional security organizations, the International Labor Organization and many others might be the recipients of warnings, depending on the case. International organizations with directly relevant functions and programs, such as the UN High Commissioner for Refugees, the UN Disaster Relief Organization, the League of Red Cross Societies, the International Committee of the Red Cross and others, would certainly be warned of the impending flow of migrants. In some instances, they would also be able to approach the causing governments with a view to prevention.
3. Voluntary agencies and specialized networks. Voluntary agencies primarily aim at influencing governmental policies and work primarily at practical humanitarian relief. In either role, a voluntary agency inter-

ested in refugees and forced migrants would eagerly seek any advanced forecasts of the forced movement of people. Those voluntary agencies that specialize in the handling of refugees would be able to use early warnings to prepare organizational personnel, practices and supplies for the particular needs of a situation calling for relief. This rather technical approach can be distinguished from the allied activity of alerting governmental bureaucracies that they would be engaged.

Officals of voluntary agencies, their counterparts in government, opinion leaders and researchers tend to form an informal network that reaches into many corners of national states and across borders. Early warning to governments engages a part of these networks but also may stimulate policy decisions that tend to constrain officials from at least some activity in the opinion-forming and informational realm.

Other members of the networks operate under lesser constraints; information given them tends to circulate and to reach governmental officials as well. Furthermore, the non-governmental elements of the networks usually have divergent opinions, producing constant examination of policies in a way that the more formal discipline of governmental bureaucracies usually cannot match. At the same time, networks dependent on strong participation of private persons are very unevenly distributed on the world scene and are most strongly represented in the highly developed, democratic countries.

4. News media and other redisseminators. These have the widest reach in spreading information. In many instances, their reaction to an early warning would presage any sort of general reaction to a case of forced migration. Yet, news media usually react in a higly unpredictable manner to special forecasting. If the news media respond to an early warning by giving it much prominence, the result could embarass a government into moderation or, at the opposite extreme, lead to attempts to conceal a situation of forced migration. As the role of both print and electronic media is to spread information widely, some or many incidents of early warning could involve deliberate secrecy. Depending on the desired procedures, *e.g.*, confidential intergovernmental negotiations or informal contacts through private channels with an offending government, distribution of an early warning might be limited at first. Nevertheless, it is likely that news media will eventually learn of any early warning.

   Slower media, such as scientific journals or commentaries on public affairs, usually would not be the target of an initial early warning. However, they should have full access to materials that were generated in the past. These journals provide an important source of specialized information for members of networks dealing with forced migrations.

5. Research and university bodies. The notion of a network includes most research and university bodies. These are served by specialized journals and often are represented at conferences of members of the networks concerned with forced migration. The importance of research bodies in early warning has to do with conceptualization of the practice, evaluation of its use in specific instance, recording the history of early warning and developing schemes of forecasting. In addition, university bodies usually have some associated training function.

With the exception of the research and university category of targets, all receivers of early warning noted here have executive or policy-making functions. They would be given early warning messages primarily because they would be expected to react on the basis of new information or new appreciation of existing information. In this sense, early warning has a practical coloration.

WHO ISSUES AN EARLY WARNING?

Some of the mechanisms that early warning requires are now in place but, far from all. The identity of reliable issuers of early warning in any given instance cannot now be determined in advance, although several intergovernmental and voluntary groups would have at least some capacity to sound the alarm about a dangerous situation. In fact, from time to time, some of them do just that. Some observers would insist that certainty about the source of early warning poses the single most important issue. In any case, designation or construction of sort constitutes an essential step in creating an early warning system that functions reliably and effectively. At least the following four organizing suggestions can be made:

1. A hierarchical or centralized approach. Most existing organizations intended to deal with natural or man-made disasters involves strong centralizing tendencies. Defined assignment of responsibility probably is regarded as an imperative by many or most of those who manage organizations. When governments are involved, limitation of authority given to other bodies, such as international institutions, also looms large. Institutional managers highly value coordination of efforts. Even competing or complementary organizations with a voluntary base tend to form groups to represent their common interests at a higher level. It would be hypothetically possible either to create a new, centralized institution to produce early warnings, or else, to empower an existing agency with that function. This assignment of responsibility probably would require very wide concurrence of governments, some of which have good reason to oppose any efficient early warning mechanism. It is also conceivable that a regional basis for such an organization could be constructed.

2. A functional approach. Existing organizations now monitor some of the causes of forced migration. Important organizational facilities exist, especially in the field of protection of human rights. These include intergovernmental, regional and voluntary groups. Similar organizational facilities treat agricultural output, environmental decline, demographic change, trading patterns and a large number of other social phenomena that have to do with forced migration. The use of military force usually is reported widely in mass media, although the preparations for fighting may be hidden or unappreciated.

A functional approach to early warning would try to build into monitoring procedures of existing facilities some capacity for specialized attention to developments which would have the most bearing on forced migrations.

For example, human rights organizations could give extra emphasis, or pointed attention, to the upwelling of racial discrimination accompanied by forcible seizure of productive property of affected people as the sort of situation that may produce refugees. The existing organizations would thus continue their normal work but would be in position to issue what amounts to early warnings with regard to events in their specialized fields of interest.

3. A non-institutional approach. If a functional approach to early warning were attempted, it seems likely that informal networks of interested persons would also have an important role in inducing existing organizations to pay special attention to factors tending to produce refugees. In any case, such networks now exist, along with coordinating committees and a few research organizations. Most of the current reporting that resembles early warning along the lines sketched here derives from information passed along informal and formal networks and through existing organizations. No formal, permanent machinery devoted to early warning nor specialized warning functions attached to other organizational work now functions. Nevertheless, when leadership is available in a specialized network or in an organizational framework, substantial early warning effects sometimes emerge. Consequently, it is conceivable that more discussion of the need for warning would stimulate informal emulation of a model of institutionalized early warning.
4. A mixed approach. This would be intended to encourage leadership in order to take flexible advantage of existing facilities.

An intergovernmental component could be organized. One form might be to grant specific authority of existing organizations, such as the UN High Commissioner for Refugees or the UN Disaster Relief Office, to coordinate information with a view to issuing early warning or to stimulating others to issue such warnings. A second form would include the appointment of an official to a new specialized office, such as the High Commissioner for

Humanitarian Affairs suggested by Prince Sadruddin's report, or a not yet established High Commissioner for Human Rights. A third, but more remote possibility, might be the organization of a new intergovernmental agency, probably on less than universal membership basis.

The intergovernmental component of a mixed system would stay in close touch with voluntary agencies and other international bodies. In most instances, the intergovernmental body would not itself issue an early warning but would furnish material to others to do so. Nor would it accept responsibility for the warning. A hierarchical approach should be avoided in order to be able to respond to developing situations in a flexible manner.

The early warning system should aim at both prevention and efficient advance preparations for a possible emergency. An intergovernmental component should have its own research arm or else should enter a long-term commitment with one or more research organizations. These would collate information, develop conceptual apparatus for analysis and forecasting and examine the results of efforts to signal an impending critical situation.

POLITICAL AND OTHER LIMITATIONS

Early warning implies the same kind of sensitivity that developed a decade ago around the efforts to create a right of asylum. Both notions seem to intrude in matters that governments guard jealously. Early warning, does not, moreover, deal exclusively with victims of governmental malevolence. It deals with the malevolent programs or activities themselves. It may aim at prevention, which read from the other direction, means changing actions now in progress or about to be undertaken. Moreover, it forecasts unpleasant outcomes in the forms of injured lives and splintering society. These outcomes can be traced to causes: the result is an early warning of more to come, either in the form of a forced migration or the imminent arrival of forced migrants on alien soil or at points of possible shelter within the state of origin. All of this involves governmental policies and therefore, is political.

The unavoidable element of human rights policies makes the subject perhaps even more controversial than rather amorphous claims based on humanitarian considerations would be. The standard of human rights represents an external means of measuring and judging the actions of a government.

Many governments have good reason for confronting such a standard with uneasiness. After all, any external standard clashes with emphases on the national interest, narrowly conceived in the short term. It runs contrary to the unilateralism that characterizes the policies of the United States and the Soviet Union, as well as some other governments. It suggests a system of restraint on governmental and social actions. That these restraints have a

humanitarian purpose does not overcome the national interest argument; it runs parallel to it. Political leaders who put what they think is national interest above justice and human decency, cannot bridge the parallel lines of thought.

In some respects, therefore, early warning may be an imperiled notion, perceived from the outset by nationalistic officials as flawed or objectionable. A conceptual examination of the idea of early warning would give little comfort.

Early warning cannot be understood as a handy device to prevent the landing of Haitians in Florida or to turn back Afghans or Vietnamese from seeking asylum. Such an instrument of narrow expediency would hardly endure the first crisis. Therefore, constructing a real system of early warning would require an uphill fight and the development of new tolerance among decision makers. It is a subject, also, that needs ultimately to be linked to other intensely difficult topics, such as the prevention of international strife, the promotion of economic development, the provision of reliable disaster relief and the more rapid growth of humanitarian law.

Such difficulties do not mean that an effort to provide a functioning early warning system on forced migration can never succeed. It just might, especially if it is treated modestly and especially if flexibility and avoidance of rigid hierarchy are taken seriously.

11

Some Reflections on the Protection of Refugees from Armed Conflict Situations

G.J.L. Coles*

Chacun porte en lui-même un grand thème intérieur. Le Laisser chanter et chanter encore. Inutile de chercher ailleurs. De là naît une création continue.

Frère Roger, de Taizé

In September 1969 the Assembly of Heads of State and Government of the Organization of African Unity adopted in Addis Ababa a Convention Governing the Specific Aspects of Refugee Problems in Africa.[1] This instrument contained in its Article 1 a definition of the term "refugee" which was significantly wider than the definitions given earlier in the 1951 United Nations Convention relating to the Status of Refugees[2] and its 1967 Protocol [3] and in the 1950 Statute of the Office of the United States High Commissioner for Refugees.[4] The definition reflected the realization of the African region in a period of hard and often violent struggle for self-determination and national development. It is also consistent with the realities which now exist in other regions of the world; although the steady deterioration in social and economic conditions of some areas have provided additional significant causes of external displacement.

In addition to the requirement of a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" which is common to all these definitions, the OAU definition adds an additional eligibility provision:

*The author is Senior Legal Adviser, Chief of Conferences and Promotion of Refugee Law Section, Division of International Protection, Office of the United Nations High Commissioner for Refugees.

[1] UNTS, No. 14691.

[2] UNTS, No. 2545, Vol. 189, p. 137.

[3] UNTS, No. 8791, Vol. 606, p. 267.

[4] UNGA Resolution 428 (V).

> "The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of the country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality".[5]

The OAU definition is not simply wider; it is also qualitatively different. Whereas the earlier definitions contemplate situations of fear and danger created essentially by deliberate acts and policies, often of a discriminatory character and normally of the authorities of the country, the OAU definition contemplates also a state of affairs generally where the qualities of deliberateness and discrimination need to exist.[6] It is generaly agreed that this additional eligibility provision covers armed conflict situations, whether international or internal: situations which are today a world-wide phenomenon. The fear and danger may be in regard to such non-deliberative factors as the accidental consequences of intensive fighting and widespread famine and disease, and may also relate to factors which are outside the physical control of authorities, such as the random lawlessness following on the breakdown of normal order in society.

The essential conditions for refugee status under the OAU Convention are not only subjective (*i.e.*, the intentional violation of human rights) but also objective (*i.e.*, dangerous conditions generally which are to be reasonably implied in such situations as "aggression" and "events seriously disturbing public order"). It is for these reasons that the formulation of the additional eligibility provisions in the OAU Convention omits the requirement found in both the 1951 Convention and in the 1967 Statute, in relation to the general definition of a "refugee", that the person seeking refugee status should be unable or unwilling to avail himself of the protection of his country of nationality.

In regard to the entire situation which the OAU Convention contemplates, the need for protection may arise not only from the deliberate refusal to extend or to accept diplomatic protection, which some jurists have wrongly assumed is an essential aspect of the refugee state, but also from the existence of a generally disturbed or abnormal situation in the country of nationality, which, independently of will,may make the extenison of diplomatic protection either impossible or meaningless.[7] Where, *e.g.*, a country is in the throes of a

[5] Art. I (2).

[6] *See*, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, Geneva, 1979, at p. 17.

[7] *For a treatment of this aspect, See*, Grahl-Madsen, *The Status of the Refugee in International Law*, 1966, Vol. II, pp. 95-101.

major armed conflict which has caused large numbers of its civilians to flee into neighboring states, it should not be assumed that in all cases the protection of these people will come from the diplomatic representatives of their country of origin. For one thing, there may be no diplomatic representation in the country of refuge and no arrangement with another state in that country to represent its national interests; or, for another, the degree of disorder within the country of origin may make the meaningful diplomatic protection of its citizens abroad either difficult or impossible.[8]

The historical background to the extended definition of the OAU Convention was a preceding fifteen year period in African history of armed struggle for national liberation and serious internal disturbances following the grant of independence.

The first major post-war struggle for independence in Africa was the Algerian insurrection which began in 1954 and was "an upheaval which caused waves of suffering throughout the Maghrib".[9] In the course of the conflict, hundreds of border villages were bombed or destroyed, fields mined and herds dispersed. Caught between opposing forces, thousands of non-combatants were forced to flee, scattering along half the length of the Moroccan and Tunisian frontiers. The refugees themselves were of three types: peasants, nomads and semi-nomads. By the early 1960s almost 200,000 Algerian refugees had crossed into Morocco and Tunisia.[10]

This was the first non-European situation to draw a response from the Office of the United Nations High Commissioner for Refugees, and it was significantly different in a number of respects from the refugee situation in Europe some four or five years after the Second World War which was the immediate background to both the Statute of the Office of the United Nations High Commissioner for Refugees and the 1951 United Nations Convention. It was a mass influx as a direct result of armed conflict, whereas the post war refugee movements in Europe were to a significant extent those of individual asylum-seekers leaving political conditions; and, for political and other reasons, the permanent solution envisaged in the case of the Algerians was voluntary return, and not, as in the European case, assimilation in new national communities.[11]

In addition, the Algerian crisis posed for the United Nations High Com-

[8] See, Handbook, *op. cit.*, p. 23.

[9] L. Holborn, *Refugees: A Problem of Our Time*, Vol. II, 1975, p. 1005. Most of the following facts in this section are drawn from Holborn.

[10] *Ibid.*

[11] In the United Nations Convention, there is no provision on voluntary repatriation. The emphasis on assimilation in new national communities was one reason why the Arab countries were opposed to putting the Palestinians within the ambit of the 1951 Convention and under the protection of the Office of the United Nations High Commissioner for Refugees.

missioner for Refugees of the time an awkward question. In aiding the Algerians, was he to find that they came within his mandate — and, therefore, within his competence — because they had a "well-founded fear of being persecuted?"[12] As it was out of the question not to extend some assistance to the Algerians, particularly in view of the prompt United Nations response at that time to the Hungarian exodus, the High Commissioner acted in aid of the Algerians, justifying his decision finally on the basis that he was not making a determination of status under his mandate but exercising his good offices role.

The concept of "good offices" had been advanced earlier in regard to Chinese in Hong Kong and had been used to justify certain limited administrative action in relation to persons who were not considered by all the major countries concerned as necessarily coming within the statutory mandate of the Office.[13] It was only in the Algerian case, however, that this concept was invoked formally to cover a wide range of UNHCR activities.[14]

Refugee movements during this period were also generated by the armed struggle which broke out in the early 1960s in the African territories colonized by Portugal. In Angola, the mounting in 1961 of an intensive military campaign and the bombing and razing of suspect villages led to large-scale refugee movements. By 1966, there were some 300,000 Angolan refugees in Zaire. The conflict of Portuguese Guinea (now Guinea-Bissau) led by the beginning of 1967 to the influx of 60,000 refugees into Senegal. During the same period, some thousands of refugees left Mozambique for Tanzania, Zambia and Botswana.

Serious internal disturbances in the newly independent territory of the Congo and, subsequently, in the states of Ruanda, Burundi and Zaire also led to large-scale movements of refugees. For example, from Ruanda, some 150,000 Tutsi crossed in the early 1960s into Uganda, Zaire, Tanzania and Burundi; and from Burundi some 50,000 people crossed in the same period into Ruanda, Tanzania and Zaire.

In regard to these early internal disturbances, Holborn commented that given the problems of nation-building and economic development in Africa, UNHCR found that it was often preferable to avoid invoking the Statute's definition of the term "refugee" but to see, instead, a series of "good offices" resolutions of the General Assembly as a basis of action. In this way, the High Commissioner was able to mobilize and give material assistance to refugees and to do so without involving himself in the underlying political causes of the particular problem. As a result, it was also possible for him to act as a trusted intermediary between the African countries of origin

[12] Holborn, *op. cit.*, Vol. II, p. 1006 *et seq.*

[13] *Ibid.*, Vol. I., pp. 435-436.

[14] *Ibid.*, Vol. I, p. 436 *et seq.*

and of asylum.[15]

It might be added that recourse to the "good offices" resolutions also reflected the complex character of the problems in some of the newly independent territories of Africa, where external intervention and insurrection were added to other problems of social order and development.

Today armed conflicts and serious internal disturbances are worldwide phenomena. They are taking place in every region of the world, sometimes on a large scale. Even in the areas where no fighting is taking place, inter-state relations, particularly between the main power blocs, are marked by deep distrust and frequent tension, producing, in the case of the superpowers, an awesome arms race where the physical means to destroy several times all life on this planet have already been amassed. It has been estimated that the total strength of present nuclear arsenals may be equivalent to more than three tons of TNT for every man, woman and child on the earth.[16]

A recent study prepared by the London *Sunday Times* showed that a quarter of the nations of the world are currently caught up in conflicts which have already claimed up to five million lives. More than four million troops are fighting each other. Although many of the wars are in the Third World, many are fuelled directly or indirectly from outside. The conflict listed by the *Sunday Times* included five wars between states and more than 30 insurrections to overthrow a government or to establish a new and separate state.[17]

In recent times nearly all the large refugee populations have come from armed conflict areas in Asia, the Middle East, Africa and Central America. The vast majority of the ten million or so refugees in the world today have been displaced as a result of armed conflict. Many of these refugees are women, children and elderly people who have been forced to flee the many mindless brutalities of violence and the grave deterioration in the social, economic and physical conditions brought about by the violence.

Until recently, almost all of this transfrontier movement has taken place within the regions of the Third World; but in recent times, for various reasons, the refugee movements have begun to overflow regional confines, and relatively small but significant and growing numbers of people have sought refuge in the more secure and prosperous countries of the developed world.

Their journey to the developed countries in search of temporary refuge or of a new life within another national community is now facing the receiving

[15] *Ibid.*, Vol. II, pp. 837-838.

[16] *See, Comprehensive Study in Nuclear Weapons*, United Nations, New York, 1981, p. 5 *et seq.*

[17] *Sunday Times*, 21 January 1984.

countries with new and grave moral and political decisions.

A significant feature of many armed conflict situations is the multiform aspect of the danger which they pose for human beings. In addition to the perils and hardships which the deliberate and controlled pursuit of military objectives may inevitably create for the civilian population as well as for combatants, there is also the danger of uncontrolled or random acts of violence and of a serious general deterioration of the social, economic and physical conditions of a country as a result of the conflict. Intensive fighting can lead to widespread and indiscriminate death and destruction; and combatant forces, hardened or brutalized by the savageries of war, can inflict severe suffering on the civilian population. The social order can collapse to the point where anarchy exists and even basic rights and freedoms cannot be protected. Instead of one central authority in effective control of a country, two or more local *de facto* authorities can exist, perhaps each exercising only partial control over an uncertain area of territory. An economic collapse and a general deterioration in the physical environment can lead rapidly to widespread famine and disease.

The general state of affairs which can result from armed conflict and which is often so harmful to human beings is usually far too complex to permit the single factor of "persecution" to be identified as the sole main cause of a final external displacement.

The term "persecution" which was adopted in the 1950 Statute of the Office of the United Nations High Commissioner for Refugees and in the 1951 United Nations Convention as denoting the essential criterion for refugee status under the general provisions of these instruments and which was interpreted as applying essentially to deliberate acts and policies, often of a discriminatory character and normally of the authorities of a country, reflected mainly the peacetime conditions existing at that time.

In regard to the situation existing immediately after the Second World War, the 1946 Constitution of the International Refugee Organization (IRO) provided for a response not only for "refugees" but also for "displaced persons". While, under the terms of this Constitution, a "displaced person" could also be a "refugee", the term "displaced person", as defined in Part I, Section B, of Annex 1 to the IRO Convention, enlarged significantly the personal scope of application of the Constitution of IRO.[18]

More significantly, in 1949 the United Nations General Assembly defined a Palestine refugee, for the purposes of the competence of the newly esta-

[18] On this aspect, *See*, Grahl-Madsen, *The Status of Refugees in International Law*, 1966, Vol. I., p. 133 *et seq.*

[19] UNGA Resolution 302 (IV).

blished United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) as, *inter alia*, someone who, as a result of the conflict in Palestine in the preceding year, had lost his home.[19] Here, the loss of home for the purposes of UNRWA's mandate is not related expressly to "persecution" but simply to conflict.

It may be useful to consider the recent history of Kampuchea as an illustration of the complex kind of situation which can arise in the course of an armed conflict. A culmination of many years of conflict in that country led initially to mass executions and to the displacement of the entire populations of urban areas. A subsequent grave deterioration of physical conditions generally caused widespread disease and malnutrition. Disastrous floods and drought added to the human plight; and a new war developed.[20] When some 350,000 Kampucheans sought refuge in Thai territory during the peak of national suffering reached in the summer of 1979, the non-combatants were fleeing many factors: grave violations of human rights, physical danger as a result of the conduct of war, famine, drought, disease and extreme physical hardship.

The apocalyptical character of such experiences brings to mind the words of the prophet Ezekiel foretelling the nature and scale of the disaster overshadowing his own people some two thousand and five hundred years earlier:

> "The Lord Jahweh says this: Now, if I do send my four dreadful scourges against Jerusalem — sword, famine, wild animals and plague — to cut off its men and beasts, and if any survivors are left there to contrive the escape of son and daughter, they will come for you to see their conduct and actions and so be comforted in spite of the scourges I shall have brought on Jerusalem and in spite of everything I shall have brought on her".[21]

The scourges of the sword, famine, wild beasts and plague are all well known to historians of war.[22]

In recent times, drought and famine have once again become significant causes of transfrontier movements in certain areas of the world; and they are often accompanied by disease. Behind these recent movements have been grave problems of economic and social development, aggravated in some

[20] Some observers have estimated that during this period be'' 'een one-third and one-half of the national population of seven million perished.

[21] Ezekiel 14, 21-23. (The text is from the Jerusalem Bible.) An evocation of this passage is found in Revelation 6.8 where the image is of Four Horsemen given authority over a quarter of the earth to kill by sword, by famine, by plague and wild beasts.

[22] In an age where the spectre of religious war is appearing again, it is instructive to read an account such as that of the English historian, C.V. Wedgwood, of the extensive and long-lasting havoc wrought in Europe by The Thirty Years War (1618-1648). In the introduction to her book, a classic of modern history writing, Professor Wedgwood said:

cases by serious internal disturbance and external intervention, which have led to conditions where even the transportation of urgently needed relief has been rendered impossible or extremely difficult.

Following his recent visit to West Africa, the Secretary-General of the United Nations, Mr. Pérez de Cuellar, informed the international community in February this year that "migration within and between African countries in search of water and food has become a major problem". He stated that the impact of the continuing drought was clear and frightening. Villagers were being forced to migrate in search of food and water, not only for themselves but also to support their livestock. The movement of populations from food and deficient areas to overcrowded camps, villages and towns was creating intolerable conditions which only further strained the limited resources available. The problem in Southern Africa was further aggravated by external destabilization and, in some instances, armed incursions. He called for a concerted attack on the problem of migration within countries and between countries.[23]

On the 26th of last month, the New York Times carried a report that Zimbabwean officials had stated that about 100,000 Mozambicans, many of them starving, had inundated Zimbabwe's northern and eastern border areas in the last few months. The influx was continuing at a rate of 1,000 a week. The signs of their malnutrition were obvious: distended bellies, the reddish hair that is a sign of protein deficiency in children and blindness from chronic lack of Vitamin A. Zimbabwe health officials stated that they were already battling 2,000 cases of cholera among the Mozambicans in the southeastern border and they feared other serious health problems. Each day children and old people were dying from starvation. The lack of toilets and water and the Mozambicans' practice of burying dead children in shallow graves were seen as serious health hazards.

Through an interpreter, a Mozambican said that his family had hiked for more than a week from Mozambique's northern Tete province because the drought-parched land had no food. "There is nothing there. We were walking through villages of death", he said. "In village after village people wanted to

> "I wrote this book in The Thirties, against the background of depression at home and mounting tension abroad...I wrote with the knowledge, sometimes intimate, sometimes more distant, of conditions in depressed and derelict areas, of the suffering of the unwanted and uprooted — the two million unemployed at home, the Jewish and liberal fugitives from Germany. Preoccupation with contemporary distress made the plight of the hungry and homeless, the discouraged and the desolate of The Thirty Years War exceptionally vivid to me".
>
> (C.V. Wedgwood, *The Thirty Years War*, Penguin Books, 1958, p. 9).

[23] Statement by the Secretary-General on the Economic and Social Crisis in Africa, 19 February 1984.

come with us but they were too weak. If we didn't leave we would just die there". The man said that two of his four children had died during their 75 mile walk.[24]

Other reports suggested that about a quarter of a million people in Mozambique may have perished in recent months from famine.

The press also carried reports of possible expulsions of large numbers of the "illegal immigrants".

A grim account of the famine and drought situation throughout Africa was given on 26 February this year in the *Washington Post*. This stated that thousands of African adults and children were dying daily and that millions more were now facing the possibility of death by starvation.

Against this contemporary background of widespread violence, grave problems in social and economic development, famine and disease, the traditional Western understanding of "persecution" as the only major cause of refugee flows is manifestly inadequate as a principle for universal application. People flee — and perish from — not only deliberate acts of persecution but also violence generally and other grave forms of non-deliberative danger.[25] (Left aside is the problem generally within many regions of the Third World of harsh and extremely difficult conditions of life gravely affecting life expectancy and the basic quality of life; conditions which are leading increasingly to "illegal immigration".)[26]

It may be true that the genesis of many refugee situations lies in the grave violations of human rights, although this perception should not cause one to overlook the role that acts of aggression have played in refugee movements; but these violations may be the proximate cause of a refugee flow. The proximate cause may be a consequence of a root cause, as in the cases of the physical violence provoked by the violation of rights, the further violation of

[24] The above is taken from the New York Times report.

[25] In its observation three years ago to the Secretary-General of the United Nations on the General Assembly's item on international cooperation to avert further flows of refugees, the proposer of the item, the government of the Federal Republic of Germany, commented:

> "Past experiences, especially in certain regions of Africa, Asia and Latin America have shown that not only international conflicts, the threat or use of force within states and administrative coercive measures, but also natural disasters and similar unforseeable emergencies may result in an exodus of refugees".

Report of the Secretary-General; International Cooperation to Avert New Flows of Refugees, 23 October 1981, A/36/582 at p. 19.

[26] This problem constitutes a vast "grey" zone where the moral and social issues are not clear-cut. Sometimes, as in the case of certain complex refugee movements, the socioeconomic factors behind the movement may be significant, and, for practical or humanitarian reasons, it may be difficult or finally impossible to sort out "immigrants" from "refugees" for the purposes of granting or withholding residence or resettlement. In recent times, such cases have proved far from infrequent.

rights in response to the violence and finally, a widespread situation of violence and disorder generally. It is usually the latter situation which produces the mass exodus.

Armed conflict, therefore, is not something different and separate from violations of human rights; it is a serious gradation in the deterioration of social conditions, adding to the dangers of a deliberative kind the non-deliberative dangers which inevitably increase significantly in times of war.

In its 1981 annual report, the Inter-American Commission on Human Rights commented:

> "The Commission observed the organic relationship existing between the violations of the rights to physical security on the one hand, and neglect of economic and social rights and the suppression of political participation, on the other. Neglect of economic and social rights, especially, when political participation has been suppressed, produces a social polarization which then leads to acts of terrorism by and against the government. Neglect of economic and social rights — the extreme poverty affecting vast parts of the population — has been the fundamental cause of the terror prevailing in several countries of the hemisphere. This epidemic of the displacement of persons has converted 10 percent of the population of one country into refugees. In others, the lack of political participation has caused massive flight in boats and ships (boat people) of thousands of people. Such massive migrations are a challenge for the nations of the hemisphere, which are unprepared for the permanent integration of so many people into their countries".[27]

The link between social internal stability and the physical conditions in a country requires care in drawing a distinction between a man-made disaster and a natural disaster. This distinction has sometimes been made for the purposes of establishing appropriate international institutional competence and related questions of protection and assistance.[28] An earthquake may be unequivocally a natural disaster; but the heavy loss of life following a drought may have a number of explanations, including problems in social and economic development, external intervention, acts of aggression and serious internal disturbance.

The accurate identification of the proximate cause of a refugee flow, as well

[27] Annual Report of the Inter-American Commission on Human Rights, 1980-1981, OEA. *See*, L/V/11 54, Doc. 9, Rev. 1.

[28] *See*, Brown, *Disaster Preparedness and the United Nations*, 1979, pp. 14-32; and for a brief treatment of this aspect in the refugee context, Goodwin-Gill, *The Refugee in International Law*, 1983, p. 2.

as of its remote (or root) cause, is normally an essential prerequisite for an adequate response, whether it be in relation to the intermediate needs of protection and assistance or in relation to solution (understood in its full sense as encompassing both the preventive and curative aspects).[29]

It is not usually helpful, *e.g.*, to present an immediate problem of armed conflict as a human rights one. It may, or may not be, the case that an armed conflict is a direct consequence of a human rights situation; but the immediate problem is the use of force. If the root cause of a refugee situation is related, *e.g.*, to a general problem of social and economic development manifesting itself finally in the use of force, it would not be helpful to characterize it simply as a domestic human rights problem.

A problem with definitions is that they have an exclusionary effect, and it sometimes happens that in order to obtain a response which is conditional upon certain criteria being met, the facts of a situation are presented in a false or distorted way so as to obtain the desired response. To a certain extent the reasons may be understandable; but ultimately, the consequences of such falsehood or distortion, particularly if perpetrated on a huge scale, are likely to be detrimental; as the measures adopted to meet the needs of a situation, especially in regard to the country of origin, are likely to be inappropriate or inadequate. It may also happen in a reverse case that the exclusionary effect of a definition may serve to present a "compelled" transfrontier movement as a purely "voluntary" or "illegal" one. Likewise, the reasons may be understandable, where genuine concern is felt about the implication of the movement; but in the long term, a response which is limited by a simple "illegal immigration" perspective may prove to be seriously inadequate in dealing pragmatically with a situation which requires a different and more comprehensive range of measures to prevent a further deterioration of that situation.

The basic problem with the traditional idea that "persecution" is the only major cause of refugee movements is that it does not correspond to the global refugee phenomenon of today. Its perpetuation in international law or policy is either a consequence of an anachronistic approach or a result of a considered decision to respond to a problem by admitting only some of its aspects. In either case, the consequences are likely to be unsatisfactory, whatever the perspective adopted; for reality has a way of finally intruding upon the scene. If the root causes of a problem are neglected, the eventual result is likely to be harsher than it might have been if effective and timely preventive or curative

[29] The integral character of the link between a) causes, b) protection and assistance and c) solution is an aspect that has not received adequate attention so far. The importance of this aspect, at both the legal and practical levels, was emphasized by the Working Group on Pre-Flow Aspects of the Refugee Phenomenon which was convened by the International Institute of Humanitarian Law, San Remo. *See*, Report, p. 4.

measures had been taken.

The challenge, therefore, is to recognize the facts as they are and to devise the most satisfactory and effective response possible to them which is both humane and socially responsible. A pre-condition of cure is accurate diagnosis.

A significant and encouraging development is the adoption of two statements in the draft report prepared so far on a provisional basis by the United Nations Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees: 1) that the scope of the phenomena to be addressed by the group had to be wider than the one prescribed in the existing legal definition; and 2) that the element of "coercion" or "compulsion" was a decisive factor in differentiating the movements from other movements outside the scope of the group's mandate. According to the draft report, the term "coercion" or the element of compulsion was to be understood in a wide sense covering a variety of natural, political and socioeconomic causes on factors which directly or indirectly force the people to flee from their homeland for fear of life, liberty and security or otherwise.[30]

A characteristic of a general situation of violence and disorder which normally marks a situation of armed conflict or serious internal disturbance is the frequently awesome size and rapidity of the final exodus. While geographical factors may have a bearing on the size of an exodus, experience has shown that desperate or determined people are prepared to take great risks and endure much hardship to escape an intolerable situation. They are also capable of great resourcefulness in obtaining their departure. In many cases, the authorities of the receiving country, however unwilling they might be to receive the refugees, find that they have no alternative but to let them in.

It is instructive to consider the strength and the speed of some refugee flows in recent times.

In the case of one of the largest refugee movements in modern times, which occurred in 1971 as a result of armed conflict in what was then Pakistan and which followed on the havoc wreaked earlier by floods and a cyclone, some ten million refugees entered India from East Pakistan. Within one month of the outbreak of conflict in March of that year, more than 1,200,000 refugees had entered India. Four months later, the Indian government stated that 8,320,000 persons had entered. In December, this figure was increased to ten million. This was a monthly influx rate of one million people.

Earlier, in 1947, the partition of the Indian sub-continent had resulted, in a matter of weeks, in a two-way flight of eighteen million Hindus from Pakistan and Muslims from India. Similarly, in 1948, nearly a million people

[30] United Nations document A/AC/213/1984/WP.2/Rev. 2, paras. 8 and 10.

left Palestine in a matter of weeks in the course of the conflict which led to the emergence of the new state of Israel.

During the height of the maritime exodus of Vietnamese in the first part of 1979, the arrival figures for the neighboring countries were 13,423 (March), 26,062 (April), 51,139 (May) and 56,941 (June).

Following the deterioration of conditions in Kampuchea later that year, some 350,000 persons had sought refuge in Thailand by the end of the year.

After April 1979, when approximately 60,000 refugees from Afghanistan had sought refuge in Pakistani territority, the influx increased steadily, reaching the figure of 400,000 officially registered refugees at the end of 1979, 932,000 by the end of June 1980 and 1,100,000 by the end of September 1980. Two years later, the number of Afghan refugees in neighboring countries exceeded three million. this was an annual influx rate, over a three-year period, of one million people

In 1979, the refugee population in Somalia increased from 100,000 to 475,000. During the last quarter of that year, the influx rate was about 1,500 persons daily. By mid-April 1980, the refugee population comprised almost 20 percent of the whole population of Somalia.

Many more dramatic examples could be given.

To these cases of sudden and massive exodus should be added another kind of phenomenon, one better known to the developed countries: the less sudden flow, more akin to a steady stream than a sudden torrent, which originates usually from a number of unrelated countries, and which acquires its final large size as a result of the aggregation of the contributions of its various tributaries.

Both kinds of mass flow situations have at least one important element in common: they impose heavy strains on the protection system.[31]

The massive size of the larger movement normally precludes the possibility of individual determination of status by the receiving country. In such situations, a response is required to the group as a whole.

Where, in a serious situation of violence and disorder generally, large numbers of people, including women and children, suddenly abandon their homes and hurriedly stream into neighboring countries, there usually is little doubt that many, if not all, are refugees, at least in the general sense of the word. They are persons in need of, and seeking, refuge. People do not normally abandon their homes suddenly and enter another country without permission, more often than not destitute. At the moment of flight, it is hardly relevant for the purposes of their admission whether they are fleeing

[31] On this, *see*, G.J.L. Coles, *Problems Arising from Large Numbers of Asylum-Seekers: A Study of Protection Aspects*, 1982, International Institute of Humanitarian Law, San Remo.

persecution or indiscriminate mass executions carried out by lawless militias, the many physical dangers of intensive fighting, widespread famine or disease. The practice of almost all countries who have had to face this kind of emergency on a large scale, so far mainly in the Third World, has been to make no such distinctions in practice for the purpose of granting refuge.

A problem may arise, nevertheless, where an individual determination of status or the establishment of the justification for refuge is both possible and necessary, either because of the small scale of the influx or of other special circumstances. Essentially, these are the more normal situations where the usual immigration controls can be effectively exercised.

In a broad humanitarian approach, what should constitute the basis of a right of refuge — a right which can be exercised by an individual, if necessary, in derogation of the ordinary national power to exclude or expel aliens? A general answer would seem to be the case where the movement was "compelled" or "coerced", *i.e.*, where the circumstances in the country of origin were such that the person or persons seeking refuge were recognized as having a sufficiently grave reason for leaving or not returning and for obtaining refuge in another country. Such reason would cover expulsion as well as flight.

In the OAU Convention, which, of course specifically treats of cases where persons are compelled to leave their country because of armed conflict, the term "compelled" in Article I (2) (*i.e.*, the extended eligibility provision) is not defined, although it would seem necessary, from a literal reading of that provision, that in relation, at least, to compulsion in connection with public order, the former must be in relation to "events seriously disturbing" that order. In Article III (2) of the Convention, however, the principle of *non-refoulement* is expressed in relation to a threat to "life, physical integrity or liberty". This latter provision states:

> "no person shall be subjected by a Member State to measures such as rejection at the frontier, return or expulsion, which would compel him to return or remain in a territory where his life, physical integrity or liberty would be threatened [for the reasons which constitute him a refugee within the meaning of the Convention]."

A threat to "life", "physical integrity", "liberty", is, in each case, a grave form of danger, and the approach in this Convention is consistent with a broad humanitarian view, that, in general, a right to refuge should be accorded to an individual in every case of grave and urgent necessity, at least for the duration of the necessity.[32]

[32] In Article 33 of the 1951 United Nations Convention, the rule prohibiting expulsion or return (refoulement) of a refugee is defined in that Convention applies where, as a consequence, his life or freedom would be threatened.

In its present draft articles on State Responsibility, the International Law Commission has adopted provisions on *force majeure* and fortuitous event (Article 31) and distress (Article 32). In Article 31, it is stated that the wrongfulness of the act of a State not in conformity with an international obligation of that State is precluded if the act was due to an irresistible force or to an unforseen external event beyond its control which made it materially impossible for the State to act in conformity with that obligation or to know that its conduct was not in conformity with that obligation. In Article 32, it is stated that the wrongfulness of an act of State not in conformity with an international obligation of that State is precluded if the author of the conduct which constitutes the act of that State had no other means in a situation of extreme distress but to save his life or that of persons entrusted to his care.

A right to refuge in cases of grave and urgent necessity or of stress (as in the case of expulsion) can be postulated as an emanation of a general principle of law. It can be related to basic human rights, such as those to life, liberty and security of person, or to an elementary consideration of humanity.[33] In the *Corfu Channel* case, the International Court of Justice recognized that obligations could be based on "certain general and well-recognized principles, namely elementary consideration of humanity, even more exacting in peace than in war".[34] In the *Reservations to the Genocide Convention* case, the Court observed that the principles underlying the Convention were "principles which are recognized by civilized nations as binding on States, even without any contractual obligation".[35] And in the *Barcelona Traction* case, the Court observed that certain obligations were owed by a State towards the international community as a whole; obligations which "derive, for example, in contemporary international law from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination".[36]

A broad humanitarian approach based on necessity or stress is in harmony with well established legal doctrine concerning other forms of distress. For example, in regard to cases of maritime distress, a problem long familiar to customary law, it has always been accepted by States as an axiomatic principle of humanity that a vessel has the right to make a forced or voluntary entry into a country by reason of stress or necessity. In the eighteenth century, Vattel explained the doctrine of "distress" as a "remnant

[33] On the interrelationship of the three branches of human rights, humanitarian law in armed conflict and refugee law, *see*, the recent article by Sepulveda: "Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law", The American University Law Review, Vol. III, Fall 1983, No. 1, p. 117.

[34] *I.C.J. Reports 1949*, p. 22.

[35] *I.C.J. Reports 1951*, p. 3.

[36] *I.C.J. Reports 1970*, p. 3.

of primitive common rights which no man can renounce".[37]

It is instructive generally to examine the right of involuntry entry as it has been considered judicially in the context of stress or distress at sea. In its judicial consideration, this right has been invoked principally against the incurrence of penalty for unauthorized entry.

In the *Eleanor* case, the Court said:

> "Real and irresistible distress must be at all times a sufficient passport for human beings... It must be an urgent distress; it must be something of grave necessity; such as is spoken of in our books, where a ship is said to be driven in by stress of weather. It is not sufficient to say that it was done to avoid a little bad weather, or ¼in consequences of foul winds, the danger must be such as to cause apprehension in the mind of an honest and firm man... Then again, where the party justifies the act upon the plea of distress, it must not be a distress which he has created himself, by putting on board an insufficient quantity of water or of provisions for such a voyage, for there the distress is only a part of the mechanism of fraud, and cannot be set up in excuse for it; and in the next place, the distress must be proven by the claimant in a clear and satisfactory manner".[38]

In the *New York* [1918],Livingston J. said:

> "The necessity must be urgent, and proceed from such a state of things as may be supposed to produce in the mind of the skillful mariner a well-grounded apprehension of the loss of vessel and cargo, or of the lives of the crew. It is not every injury that may be received in a storm, as the splitting of a sail, the springing of a yard, or a trifling leak, which will excuse a violation of the laws of trade".[39]

In another case decided over a hundred years later, the *May* case, the Supreme Court of Canada said:

> "A perusal of the... authorities leads to the conclusion that an entry by a foreign vessel into Canadian waters cannot be justified on the ground of 'stress of weather' unless the weather is such as to produce in the mind of a reasonably competent and skillful master, possessing courage and firmness, a well grounded *bona fide* apprehension that if he remains outside the territorial waters he

[37] *See*, O'Connell, *The International Law of the Sea*, 1983, Oxford, at p. 261.

[38] *The Eleanor* [1809], Edw. 135 at p. 161.

[39] *The New York* [1818], Wheaton, 59 at p. 68.

will put in jeopardy his vessel and cargo".[40]

A very recent case is a decision of a court of first instance in the Phillipines concerning a freight vessel, the M.V. Tun-An, registered in Panama which arrived in the port of Manila on 26 December 1978 carrying 2,300 Vietnamese aboard. It was considered proven by the Court that the Vietnamese prior to being taken aboard were in a situation of distress and that there were insufficient supplies, water and medical assistance on board. The vessel had spent 22 days on the high seas and originally was only provided with food for eighteen persons on board for fourteen days. The Master of the rescuing vessel and his crew were subject to criminal prosecution on the basis that they had violated the port regulations and the 1940 Phillipine Immigration Act.

The accused were acquitted by the Court on the following grounds:

> "The M.V. Tun-An entered Philippine waters out of proven necessity, if not emergency. Under international law and practice, a vessel has the right to make a forced or involuntary entry into a country by reason of stress or necessity. This is the accepted principle of 'easement of involuntary entry'. The Republic of the Philippines is bound by this principle".[41]

The report of entry in distress or stress of weather was also recognized in a number of international arbitration decisions.[42]

In the *Creole*, a dispute involving the United States and Great Britain, the Umpire said: "The right... to seek shelter in case of distress or other unavoidable circumstances...must be respected by all nations".[43] In the *Rebecca*, a dispute involving the United States and Mexico, the United States Mexican Claims Commission decided that as the United States ship entered the port in distress, the seizure of both the vessel and the cargo by the Mexican authorities must be regarded as wrongful. It stated that the right of entry in distress had been recognized by the international community in a concrete and emphatic manner.[44]

[40] (*1931*) 3 D.L.R. at p. 23. *See also Castren v. The King*, Canada Law Reports (1935), Ex. C.R. 103.

[41] An unpublished decision which has been included in the material on Asian practice cited by G.J.L. Coles: *Background Paper for the Asian Working Group on the International Protection of Refugees and Displaced Persons*, San Remo, 1980.

[42] *See, e.g.*, Moore, *Digest*, Vol. II, pp. 339-362, and Hackworth, Vol. II, pp. 225, 277, 278, 280 and 281. Related provisions are also found in international conventions on loading and safety at sea. For general treatment, *see*, Jessup, *The Law of Territorial Waters and Maritime Jurisdiction*, pp. 194 *et seq.*, Oppenheim, *International Law*, 8th Ed., Vol. I, pp. 503, 504 and O'Connell, *International Law*, 2nd Ed., 1970, pp. 627-629, and in relation to aircraft in distress, p. 521.

[43] Moore, *ibid.*

[44] A.D. 1929-1930, Case No. 82.

A further rule consequential upon a right of entry in the maritime context is that refuge is granted for as long as it is necessary for the ship to proceed on its voyage in safety. This is a rule of temporary refuge (or safe haven).

In practice, most States, especially those in the Third World, have respected a right of refuge in all cases of urgent and grave necessity, whether arising out of an armed conflict situation, drought, famine or some other emergency, affording protection by recourse to whatever administrative or legislative means are deemed to be appropriate.

Until recently, however, there has been a marked reluctance on the part of many States to elaborate principles of protection applicable specifically to refugees who did not come within the preview of the existing refugee instruments. For example, some United Nations General Assembly resolutions on the annual report of the High Commissioner for Refugees have referred to "refugees" and "displaced persons" in some general paragraphs but have either omitted "displaced persons" in paragraphs dealing with protection principles or have adopted ambiguous formulations on the issue of protection.[45]

A significant development in the field of protection was the adoption in 1981 by the Executive Committee of the UNHCR Programme of a Conclusion on protection of asylum-seekers in large-scale influx.[46] This Conclusion deals with the broad category of persons encompassed by the OAU Convention and includes measures for their protection (a set of basic minimum standards) as well as provisions or cooperation with UNHCR and on international solidarity, burden sharing and the duties of States. Subsequently, the basic minimum standards contained in this Conclusion were endorsed in the same year by the United Nations General Assembly.[47]

Part II, Section A, paragraphs 1 and 2 of this Conclusion state:

> "In situations of large-scale influx, asylum-seekers should be admitted to the state in which they first seek refugee...in all cases the fundamental principle of non-refoulement — including non-rejection at the frontier — must be scrupulously observed."

This Conclusion addresses a situation which, as we have seen, exists today on a large scale in a number of regions of the world and constitutes a great part of the modern refugee problem but in regard to which no comprehensive statement of principles for the protection of the people involved had been made. This omission had become particularly unfortunate as many of the people affected had found themselves in a situation of external displacement for months and, in many cases, years. Many of them had

[45] For an example of the former, *see*, UNGA Resolution 35/141.

[46] Conclusion No. 22 (XXXII).

[47] UNGA Resolution 36/125, para. 5(a).

encountered serious dangers and problems.

The antecedence of this Conclusion was an Australian initiative in the Executive Committee in the preceding year "to examine temporary refuge in all its aspects".[48] In a working paper submitted to the Group of Experts convened by the High Commissioner to conduct this examination, the Australian expert proposed a set of basic minimum standards.[49] With some modifications, these standards were adopted by the Executive Committee. In his Working Paper, the Australian expert noted that the concept of temporary refuge would be particularly helpful in case of displacement for such non-deliberative and temporary factors as drought and famine.

In his 1983 Report to the General Assembly through the Economic and Social Council, the High Commisioner referred to this Conclusion as a landmark in the development of protection. He noted that while past reports of the High Commissioner had dwelt in large measure on the situation of individual refugees or asylum-seekers fleeing persecution, to an increasing extent current refugee problems were characterized by mass movements of people forced to seek refuge elsewhere on account of serious civil disturbances or military conflict within their country of origin. This problem had given rise to a number of new problems in the field of international protection.[50]

The problem of protection of persons fleeing armed conflict situations was also addressed by two meetings of experts convened by the International Institute of Humanitarian Law of San Remo. At the first meeting on problems arising from large numbers of asylum-seekers, the Round Table considered the wider situation contemplated by the OAU Convention and concluded that "persons seeking asylum should always receive at least temporary refuge", [51] and that "persons admitted on a temporary basis should be protected by basic minimum standards of treatment".[52] At the second meeting

[48] Conclusion 19 (XXXI).

[49] United Nations document EC/SCP/16, Add.1. For two earlier versions of the basic minimum standards, *see*, Coles, *The International Protection of Refugees and the Concept of Temporary Refuge*, Proceedings of the Round Table on Humanitarian Assistance to Indo-Chinese Refugees and Displaced Persons, International Institute of Humanitarian Law, San Remo, 1980, pp. 93-104; and the Report of the Working Group on Current Problems in Asia in the International Institute of Humanitarian Law, San Remo, 1981. *See also*, Coles, "Temporary Refuge and the Large-Scale Influx of Refugees", Australian Yearbook of International Law, Vol. VIII, 1978-1980.

[50] Report of the United Nations High Commissioner for Refugees, 26 May 1983, E/1983/47, p. 1. For an analysis of the Conclusion, *see*, Martin, "Large-Scale Migrations of Asylum-Seekers", 76 A.J.I.L. 598 and Mushkat, "Hong Kong as a Country of Temporary Refuge", 12 Hong Kong L.J. 157.

[51] Report of the Round Table on the Problem Arising from Large Numbers of Asylum-Seekers, International Institute of Humanitarian Law, San Remo, 1981, p. 4.

[52] *Ibid.*

on current problems in international humanitarian law, the Eighth Round Table of the Institute adopted a number of conclusions on the protection of refugees in armed conflicts and internal disturbances.[53]

The problem was also considered by a Colloquium on Asylum and the International Protection of Refugees in Latin American held in Mexico City in 1982.[54]

It is not necessary in this paper to enter into the question of the meaning of the term "asylum" or of its applicability to situations of external displacement brought about by armed conflict or by famine and drought. In international law, this term has never been authoritatively defined and differences exist over its precise meaning.[55] In the Executive Committee, no unanimous agreement could be found to treat mere admission of asylum-seekers, particularly in the broad circumstances envisaged by the OAU Convention, as asylum, and as a compromise the simple term "admission" was adopted instead.[56] For this reason, the term "refuge" is used in this paper without prejudice to the meaning of the term "asylum" but to find a term which is broad enough to cover the protection constituted by respect for the principle of non-refoulement (understood as covering admission as well as expulsion) and such other basic rights which might derive simply from the fact of physical presence in the territory of a state.[57]

As far as the 1951 United Nations Convention and its 1967 Protocol are concerned, two factors should be taken into account when considering the question of their applicability to a refugee movement arising from an armed conflict situation.

Firstly, it is necessary to go behind the immediate circumstances to ascertain the reason why a person finds himself or herself in danger. If the danger is due to the fact that deliberate measures have been taken against that person or the group to which he or she belongs for reasons connected with the definition of "refugee" in that Convention, that person is a "refugee" within the meaning of that Convention, and is entitled to the protection of its provisions. In not a few cases of mass exodus against a general background of

[53] *See*, the Conclusions on this subject adopted by the Eighth Round Table and published by the International Institute in 1982.

[54] *See*, UNAM, Asilo y protección internacional de refugiados en America Latina UNAM, Mexico, 1982.

[55] *For a recent treatment of this question, see*, Goodwin-Gill, *The Refugee in International Law*, 1983, pp. 101-123.

[56] *See*, for example, Conclusion No. 22 (XXXII). On several occasions the Executive Committee has used the term "temporary refugee". *See, i.e.*, Conclusion No. 18 (XXX).

[57] For a treatment of "asylum" by the International Court of Justice, *see*, the *Asylum* case, *I.C.J. Reports 1955*, 266 at p. 274.

armed conflict, a significant element of "persecution" may exist.

Secondly, the silence of the 1951 United Nations Convention in regard to circumstances other than "persecution" which may compel a person to leave his or her country of origin should not be construed as the result of a deliberate decision by the States parties to the Convention to exclude other circumstances from the conditions which constitute a person a refugee in a general humanitarian sense and, therefore, entitled to some protection. As Weis has commented:

> "As one who has participated in the drafting of the Convention, I can say that the drafters did not have specific restrictions in mind when they used this terminology. Theirs was an effort to express in legal terms what is generally considered as a political refugee. The drafters thought mainly of the refugees from Eastern Europe and they had no doubt that these refugees fulfilled the definition they had drafted. The difficulties which have arisen and which have led to the existence of so-called *de facto* refugees are a consequence of changed political circumstances and the emergence of new refugee problems outside Europe of which the drafters of the definition had not been aware".[58]

Nor should it be forgotten that Recommendation E contained in the Final Act of the 1951 Conference:

> "...expresses the hope that the Convention relating to the Status of Refugees will have value as an example exceeding its contractual scope and that all nations will be guided by it in granting so far as possible to persons in their territory as refugees and who could not be covered by the terms of the Convention, the treatment for which it provides".

The question of the treatment of persons within the country of refuge is a complex one because of such factors as the size of the influx, national security requirements, the nature of the emergency in the country of origin and the related issue of the appropriate or necessary, durable or permanent solution.

While the OAU deals with the problem of external displacement as a result of armed conflict, it contains almost nothing in regard to personal status in the country of refuge or asylum.

As a general model, the 1951 United Nations Convention is not entirely

[58] *African Refugees and the Law*, ed. Melander, Uppsala, 1978 at p. 15. As Gooodwin-Gill notes, in Europe considerable discussion has focused in recent years on the problem of so-called *de facto* refugees. This group includes those who, although not qualifying under the Convention, are unable or unwilling for reasons recognized as valid to return to their country of origin. The notion of "valid reasons" has been defined as including war or warlike conditions, Goodwin-Gill, *op. cit.*, *p. 17.*

adequate to cover the more general refugee situation. It is not well drafted with regard to situations of large-scale influx as it is basically an instrument for the status of the individual refugee; and it is, also, an instrument for lasting or permanent settlement within the country of refuge. Many of the refugee problems in the world today, particularly those of vast agglomerations of destitute people confined to camps or areas who are without adequate or any means of self-sufficiency or any immediately foreseeable solution to their plight, were never or were barely contemplated by the 1951 Convention.

Furthermore, the solution of external settlement, the sole solution which the Convention contemplates, may not be necessary, appropriate, or possible in some situations. For example, peasantry fleeing a sanguinary armed conflict are not always fleeing the swords of persecutors; they may be fleeing a general situation of violence and disorder. Of its nature, the danger may be of a temporary character. The desire of the refugees may be to return as soon as general conditions permit. In their case, a solution of external settlement (in the sense of local integration) would be neither appropriate nor necessary. There have also been cases where the receiving State, as well as the refugees themselves, have indicated that the weight of the international effort to obtain a solution to the refugee problem should be directed not to the aspect of external settlement but to fundamental change or improvement in the situation in the country of origin.

An important aspect of such temporary situations is that the provisional character of the admission, and, therefore, of the solution provided by the receiving country, requires a status which need not be as enlarged as that necessary for a lasting or permanent solution through residence and integration; although any standards established for a temporary solution might properly be considered as minimum standards only.[59]

Basic minimum standards for the treatment of refugees in situations of "temporary refuge" (or "temporary asylum") were set out, as we have seen, for the first time in 1981 by the Executive Committee of the UNHCR Programme.

As these basic minimum standards mark a watershed in the development of international legal thinking in regard to the refugee problem and should be more widely known, they may usefully be stated in full here:

> "...Asylum-seekers who have been temporarily admitted pending arrangements for durable solution should be treated in accordance with the following minimum basic human standards:
>
> a) they should not be penalized or exposed to any unfavorable

[59] *On this, see*, para. 45, Report of the San Remo Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, Geneva 1981.

treatment solely on the ground that their presence in the country is considered unlawful; they should not be subjected to restrictions on their movements other than those which are necessary in the interest of public health and public order;

b) they should enjoy the fundamental civil rights internationally recognized, in particular those set out in the Universal Declaration of Human Rights;

c) they should receive all necessary assistance and be provided with the basic necessities of life including food, shelter and basic sanitary and health facilities; in this respect the international community should conform with the international principles of solidarity and burden sharing;

d) they should be treated as persons whose tragic plight requires special understanding and sympathy;

e) there should not be discrimination on the grounds of race, religion, political opinion, nationality, country of origin or physical incapacity;

f) they are to be considered as persons before the law, enjoying free access to courts of law and other competent administrative authorities;

g) the location of asylum-seekers should be determined by their safety and wellbeing as well as by the security needs of the receiving State. Asylum-seekers should, as far as possible, be located at a reasonable distance from the frontier of their country of origin. They should not become involved in subversive activities against their country of origin or any other State;

h) all family unity should be respected;

i) all possible assistance should be given for the tracing of relatives;

j) adequate provisions should be made for the protection of minors and unaccompanied children;

k) the sending and receiving of mail should be allowed;

l) material assistance from friends or relatives should be permitted;

m) appropriate arrangements should be made, where possible, for the registration of births, deaths and marriages;

n) they should be granted all the necessary facilities to enable them to obtain a satisfactory durable solution;

o) they should be permuitted to transfer assets which they have brought into a territory to the country where the durable solution is obtained; and

p) "all steps should be taken to facilitate voluntary repatriation".[60]

It is axiomatic that these basic minimum standards are applicable essentially only to a temporary situation. Where the situation eventually takes on the character of a lengthy and indefinite residence, the case for a different and higher set of standards, such as those incorporated in the 1951 United Nations Convention, becomes correspondingly stronger.

These standards are hardly revolutionary but are drawn from basic human rights and fundamental principles of refugee law and humanitarian law in armed conflict.[61] They might well be supplemented by reference to standards of treatment applicable in various other areas of humanitarian concern which are relevant to the treatment of refugees.[62]

In the view of this writer, these basic minimum standards should be reaffirmed and developed by the international community in an appropriate international instrument. This instrument could be either a treaty or a solemn resolution of the United Nations General Assembly, such as a Declaration.

Under the Statute of his office, the High Commissioner is charged with assuming the function of providing international protection to refugees who fall within the scope of the Statute and of seeking permanent solutions for the problems of refugees by assisting governments to facilitate the voluntary repatriation of such refugees or their assimilation within the new national communities.[63] The statutory definition of a refugee is very similar to that contained in the 1951 United Nations Convention except that it does not include an explicit geographical limitation provision.

Under subsequent resolutions of the General Assembly, he has also been

[60] As has been mentioned, these standards were endorsed by the United Nations General Assembly in Resolution 36/125, para. 5(a).

[61] For a general comment on these standards, *see*, Martin, *op. cit.*

[62] *See, e.g.*, Mushkat, *op. cit.* Also, for a general treatment, Goodwin-Gill, *op. cit.* pp. 137-140. In regard to humanitarian law in armed conflict, it should be remembered that the Geneva conventional law applies mainly to the parties to an armed conflict and is not, therefore, directed generally to non-parties. While rules for the protection of refugees are found in the international humanitarian law instruments, they relate basically to the parties to the armed conflict and to the areas where a state of armed conflict exists. Displacement outside the country of origin, therefore, is not a situation which is considered by these instruments. It may be maintained, however, that certain basic humanitarian principles which are expressed in the Geneva Convention and Protocols apply analogously to situations where persons fleeing an armed conflict find refuge in another state. An example is the fundamental rule of humanitarian law that persons who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. *See*, "Fundamental Rules of International Humanitarian Law, Applicable in Armed Conflicts", International Committee of the Red Cross, League of Red Cross Societies, Geneva, 1979. Also, *see*, J. Patrnogic, International Protection of Refugees in Armed Conflicts", Annales de Droit International Médical (1981), reprinted by UNHCR.

[63] UNGA Resolution 428 (X), Statute, para. 1.

empowered to provide protection and assistance to persons who do not come within his statutory competence. On different occasions, these persons have been variously described: "persons to whom the High Commissioner", extends his good offices", "persons of concern to the High Commissioner, "*de facto* refugees", "persons in a refugee-like situation", "displaced persons" and "asylum-seekers". The two terms used most frequently in recent times have been "displaced persons" and "asylum-seekers".

The term "displaced persons" has been used regularly since 1975 by the United Nations General Assembly, which has spoken of "refugees and displaced persons".[64] This term, however, has never been defined by the General Assembly and a further complication is that it has been given a number of different meanings at various times. For example, in the 1946 Constitution of the International Refugee Organization, it was defined as a person who was deported from or obliged to leave his country of nationality or former habitual residence, such as a person who was compelled to undertake forced labor or who was deported for social, religious or political reasons. More recently, in the General Assembly and elsewhere, it has been used to refer to people displaced internally.[65]

In 1977, the High Commissioner requested the Executive Committee to clarify the distinction between "refugees" and "displaced persons". No formal advice was tendered, but there was considerable support in the Executive Committee for the view that "refugees" were those who had crossed an international frontier, whereas "displaced persons" had not.[66]

In his 1979 lecture in the Nordic Seminar, the High Commissioner, Mr. Poul Hartling, stated:

> "[The] second paragraph in the OAU definition... corresponds, by and large, to the concept of 'displaced persons' who find themselves outside the country of nationality... It does not refer, therefore, to internally displaced persons".[67]

[64] For the most recent example, *see*, UNGA Resolution 38/121 on the "Report of the United Nations High Commission for Refugees".

[65] *See, e.g.*, UNGA Resolution 1980/8 ("Assistance to Displaced Persons in Ethiopia").

[66] *See*, Goodwin-Gill, *op. cit.* p. 10.

[67] In contrast, the former High Commissioner for Refugees, Sadruddin Aga Khan defined the term "displaced person" in his 1976 Hague Lectures as applying to those:

> "whose situation is in many aspects analogous to that of refugees. Uprooted from their homes by events similar to those which create refugees, displaced persons experience the same hardships and suffering; but they retain in principle their national status and do not present *a priori* any special legal problem. However, due to circumstances, to their violation, to the confusion prevailing in the country or to the slowness of the authorities of their former or new country of residence in coming to their aid, those persons also sometimes find themselves, at least temporarily, in a precarious and uncertain situation, very similar to that of refugees".

In relation to the recent General Assembly resolutions which refer to both "refugees" and "displaced persons", this latter view might be regarded as strengthened by the fact that the first General Assembly resolution to adopt the phrase "refugees and displaced persons" was drafted in the period marking the beginning of the mass exodus from Indochina, the brunt of whose land movement was borne by Thailand, which considered those coming from Laos and Kampuchea to be "displaced persons".[68]

A more recent approach has been to avoid using the term "displaced person" and to speak instead of "asylum-seeker", a term intended to apply to all who are compelled to seek refuge in another country.[69] The use of this term in this way, however, is not without its own difficulties, particularly in the context of protection principles considered as applicable only to the refugee situation. Literally, the term "asylum-seeker" means no more than someone seeking asylum: it does not imply necessarily that the person has a case warranting the grant of "asylum" or refugee status. It cannot be presumed even in mass influx situations that everyone seeking "asylum" will be recognized eventually as a refugee or granted asylum.

In ordinary layman's usage, the term "refugee" has been employed to cover all cases of coerced movement. Perhaps, the distinct universal reluctance show hitherto to employ this term in a formal or legal context applying to a category of persons wider than that found in the 1950 Statute or the 1951 United Nations Convention has been largely due to the assumption which was widely held until recently, that the correct response to a refugee situation normally is assimilation into new national communities.[70] This assumption may have had more to do with recent European history than with a wider international experience. In recent times, this assumption has clearly been incorrect for, as the practice of States has now amply shown, the temporary nature of a displacement may make integration into another community neither necessary nor appropriate.[71]

The liberation of international refugee thinking from undue rigidity and the adoption of a flexible approach to take into account the many and varied circumstances of the universal refugee problem frees the term "refugee" from unnecessary and unhelpful encrustations which serve only to hamper the use

[68] UNGA Resolution 3453 (XXX). In clause 3 of the Thai Regulation concerning Displaced Persons in Neighboring Countries, a "displaced person" is defined as "he who escapes from dangers due to an uprising fighting of war, and enters the Kingdom in breach of the Immigration Act".

[69] This is the approach taken, *e.g.*, in Conclusion No. 22 (XXXII) of the Executive Committee of the UNHCR Programme.

[70] This assumption was influenced to some extent by the historical factors which resulted in the 1951 United Nations Convention containing no substantive provisions on voluntary repatriation.

[71] For a treatment of this aspect, *see*, G.J.L. Coles, "Temporary Refuge and the Large-Scale Influx of Refugees", Australian Yearbook of International Law, Vol. VIII, 1978-1980.

of a term generally applied to all forms of coerced movements of nations and which cause a confusing proliferation of terms.

Until recently, many States have been reluctant to recognize formally a protection function for the United Nations High Commissioner for Refugees in regard to persons who did not come within the competence of his mandate under the Statute. In the sixties, the High Commissioners themselves disclaimed any such protection function. For example, it was said, in 1962, that good offices could be used as the basis for action "when the object is merely to give urgent material help"; and on another occasion, good offices was described as activity "somehow different from providing protection".[72]

Gradually, however, the situation changed and in his 1979 lecture to the Nordic Seminar, the present High Commissioner, Mr. Poul Hartling, was able to say that:

> "It must be concluded from [the] position taken by the General Assembly that, while there has not been a formal amendment of the general definition of the UNHCR Statute, the General Assembly has nevertheless recognized that persons who do not fall *stricto jure* within the general definition may benefit from certain protection activities".

The question of the nature of "these certain protection activities" and the principles of protection to which they are related have received, as we have seen, significant clarification in the 1981 Conclusion of the Executive Committee on the Protection of Asylum-Seekers in Situations of Large-Scale Influx.

In regard to the exercise by UNHCR of its protection function of supervising the application of the rules and principles relevant to protection, this Conclusion included a number of significant provisions.

Part III of this Conclusion states:

> "Asylum-seekers shall be entitled to contact the Office of the UNHCR; UNHCR shall be given access to asylum-seekers. UNHCR shall also be given the possibility of exercising its function of international protection and shall be allowed to supervise the well-being of persons entering reception or other refugee centers".

These principles are a significant elaboration of the general provisions on cooperation with UNHCR which are contained in international instruments.[73] In some situations, not only access to UNHCR but also the continuous physical presence of UNHCR in a refugee camp or settlement may be indis-

[72] *See*, Holborn, *op. cit.*, Vol. I, p. 441 *et seq.*

[73] *E.g.*, Article 35 of the 1951 United Nations Convention and Article VIII of the 1969 OAU Convention.

pensable for assuring the protection of the refugees, as was observed by Ambassador Schnyder in his recent report on armed attacks on refugee camps and settlements.[74]

Mention should be made at this point of the particular problem of the international protection of the Palestinian refugees. These people were excluded from the scope of application of the 1951 United Nations Convention and, under its Statute, UNHCR may extend its protection only to those Palestinian refugees who are outside the area covered by UNRWA's mandate (the area of operation of UNRWA is Jordan, Syria, Lebanon and the Gaza Strip). UNRWA's mandate extends only to assisting these people, not to protecting them. The Palestinian refugees, therefore, have the unfortunate distinction of being the only group of refugees in the world who are excluded formerly from any international protection; and their tragic plight, in regard to both their lack of protection and the absence of a permanent solution to their problem, has lasted for over thirty five years. The problem of the international protection of the Palestinian refugees was once again brought to the attention of the international community as a result of the recent conflict in Lebanon.[75]

Of fundamental importance, is national protection, *i.e.*, the protection that States extend to persons seeking protection. The principles and rules which should govern this protection have already been considered to some extent in the preceding section (Section X) and will be considered further in Section XIII. By the nature of things, basic protection must be provided by the States: the persons requiring protection are present physically within its territory and come within its jurisdiction and are largely dependent on its capacities and resources for their protection and well-being. In regard to protection, the role of the Office of the United Nations High Commissioner for Refugees is necessarily limited in most instances to supervising the application of the relevant rules and principles: it can never be seen as a substitute for the basic responsibility of the receiving State to provide protection.

The Red Cross Movement has also been active in assisting refugees and displaced persons. The legal grounds for activities in aid of these persons which are carried out by the International Committee of the Red Cross, the League and National Societies are to be found in their Statutes and in the humanitarian Conventions. Moreover, a number of the resolutions of the

[74] EC/SCP/26, para. 9. This same observation was made earlier in the Report of the Working Group on Current Problems in the International Protection of Refugees and Displaced Persons in Asia, 1981, San Remo, p. 10.

[75] For a recent meeting on the Protection of Refugees in Arab Countries *see*, the 1984 Report of a Seminar held under the joint auspices of UNHCR and the International Institute of Humanitarian Law, San Remo.

International Conferences of the Red Cross, of the Council of Delegates and the League's Board of Governors deal with specific aspects of this question.[76]

The Red Cross Movement cooperates closely with UNHCR in full recognition of the primary international responsibility of UNHCR for protecting and assisting refugees.

Other United Nations specialized agencies and institutions are also involved directly, although mainly in the field of assistance (*e.g.*, UNICEF, UNDP, FAO and ILO).

Mention should also be made of the increasingly important role of voluntary agencies and private individuals in making known the problem of refugees, in furthering their protection at the national and international levels and in disseminating the principles of protection.

An important and inadequately treated question concerns the relationship between refugee law and the law of neutrality. By the law of neutrality is meant, in this particular instance, the law governing the grant of refuge to armed combatants by a neutral power.[77]

According to Oppenheim, neither belligerent has a right to demand from a neutral such refuge; but neither has he a right to demand that a neutral should refuse it to another.[78] Greenspan adds that if a neutral does choose to allow a belligerent to enter, he may state the condition under which they are to be received. Where large bodies of troops are concerned, it is usual for the neutral power through its representatives to conclude a convention incorporating the precise conditions with the commanding or senior officer of the troops in question.[79]

The only exception to the principle of the discretionary power of the neutral State to grant or refuse entry, one of generally recognized usage, is that a neutral should grant temporary hospitality to belligerent vessels (and, presumably, aircraft) in distress.[80]

In relation to combatants, therefore, the question may be posed: to what extent does international refugee law affect the question of the right of entry

[76] On this, *see*, "International Red Cross Aid to Refugees". Report submitted by the International Committee of the Red Cross and the League of Red Cross Societies, August 1981, CPA/7/1.

[77] For a general treatment, *see, e.g.*, Oppenheim, *International Law*, edited by Lauterpacht, 7th edition, Vol. II, pp. 718-737; Greenspan, *The Modern Law of Land Warfare*, 1959, pp. 554-560; and Rousseau, *Le Droit des Conflits Armés*, 1983, pp. 404-408.

[78] *Op. cit.*, p. 718.

[79] Greenspan, *op. cit., pp. 554. See*, also Rousseau, *op. cit.*, 406-408.

[80] Oppenheim,*op. cit.* p. 718. Article 32 of the Second Geneva Convention (Maritime) states that hospital ships are not classed as warships as regards their stay in a neutral port.

of combatants into the territory of another State and their status in a receiving State?

In the case of the OAU Convention, which applies to persons who are compelled to leave owing to external aggression, occupation, foreign domination or events seriously disturbing public order, armed combatants would not seem to fall outside the definition of a refugee by the terms of the definition itself. For example, a retreating combatant force belonging to a national liberation movement could be considered as compelled to seek refuge in a neighboring State because of foreign domination. Nor do the exclusion clauses of the OAU Convention mention combatants *expressis verbis*.

A similar situation exists with the 1951 United Nations Convention. Neither the inclusion nor the exclusion clauses of this Convention preclude their application to armed combatants.[81]

The provisions of the refugee instruments, however, are clearly predicated on the civilian status of the refugees. They contain no provisions which deal with the special situation of armed combatants.

If an entire or large part of a defeated military force were to seek to exercise a right of entry into another State on the ground that it was compelled to do so because of adverse change in its fortunes which exposed its members to death, violation of physical and moral integrity and loss of liberty — even in circumstances amounting to political persecution — it is clear that this assertion of a right of entry could present the receiving State in some circumstances not only with a humanitarian case but also with a security problem. It is presumably for this latter reason that consent to entry by the receiving State has been traditionally considered necessary in the law of neutrality, and the State refusing consent has been recognized as having the right to repulse combatants seeking to enter its territory.[82]

In the law relating to neutrality, a basic principle is that a neutral Power must take all such measures as are necessary to prevent its territory being used as a base for illegal operations.[83] As Greenspan states further, the neutral

[81] On the question generally of the application of the 1951 Convention to persons having resorted to force or committed or having committed acts of violence, *see*, UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, pp. 39-42.

[82] For a contrary modern view on the question of right of refuge for armed combatants, *see*, Florentino P. Feliciano, "International Humanitarian Law and Co-erced Movements of Peoples across State Boundaries", San Remo, 1983, p. 24. For cases where refuge has been granted to defeated military forces, *see*, Rousseau, *op. cit.*, pp. 406-408.

[83] Of particular contemporary significance in this regard is UNGA Resolution 2633 (XXV): Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. *See* also, of course, the Charter of the United Nations.

Power which affords protection is under a strict duty to see that belligerent personnel granted refuge and their military material are taken out of the conflict for the rest of the war.[84]

In the case of bodies of troops, Article II of the Fifth Hague Convention provides:

> "A neutral Power which receives on its territory troops belonging to the belligerent armies shall detain them, if possible, at some distance from the theatre of war. It may keep them in camps, and even confine them to fortresses or localities assigned for the purpose. It shall decide whether officers are to be held at liberty on giving their parole that they will not leave their territory without authorization".

Article 12 provides:

> "In the absence of a special convention, the neutral Powers shall supply the interned with the food, clothing and relief which the dictates of humanity prescribe. At the conclusion of peace, the expenses caused by internment shall be made good".

Although the detained troops are not prisoners of war captured by the neutral Power, they are, nevertheless, in his custody, and therefore under the disciplinary power of the State which keeps them in captivity.

A special provision on the status of persons who would come within the category of prisoners of war if they fell into the power of the enemy is contained in Article 4B (2) of the Third Geneva Convention (Prisoners of War). This states:

> "The persons belonging to one of the categories enumerated in the present Article (which defines who are prisoners of war), who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favorable treatment which these Powers may choose to give and with the exceptions of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular

[84] Greenspan, *op. cit.*, p. 554.

usage and treaties". (Bracketed text supplied by the writer).

In customary international law, a special legal regime exists in relation to the rights and duties of a neutral Power concerning the naval forces of a belligerent Power which obtains refuge in its territory.[85] Concerning belligerent military aircraft, their crews and passengers, Article 42, paragraph 2 of the 1923 Hague Air Warfare Rules states:

> "A neutral government shall use the means at its disposal to intern any belligerent military aircraft which is within its jurisdiction after having alighted for any reason whatsoever, together with its crew and passengers, if any".

In regard to prisoners of war who enter the territory of a neutral State, Article 5 of the Fifth Hague Convention provides that a neutral Power which receives prisoners of war who have escaped or who have been brought there by troops of the enemy taking refuge on neutral territory, shall leave them at liberty; but if they remain on neutral territory, they may be assigned a place of residence so as to prevent them from rejoining their forces.[86]

The above provisions indicate the special character of the problems arising from the grant of refuge to belligerents. These are not problems which are contemplated by the refugee instruments.

In the personal view of the writer, the problem of the eligibility of belligerents for protection under the refugee instruments can be dealt with by regarding the rules applicable to belligerents as providing protection appropriate to belligerents, thus rendering inapplicable, on the grounds of the constructive intent of States, the rules of refugee law to belligerent forces. The problem generally of the relationship of the two bodies of law could be dealt with by regarding the rules of neutrality as applying in the case of belligerents to the mutual fields of application of the Protocols additional to the 1949 Geneva Convention, and the rules of refugee law as applying generally to civilians or civilian populations, whether in times of armed conflict or not.

In recent times, international concern has been expressed about the physical safety of refugees, particularly as a result of military attacks on refugee camps.[87] Inevitably, the related issue of the activities of refugees has also been considered in this context.

[85] On this aspect, *see*, Oppenheim, *op. cit.*, Vol. II, pp. 726-738.

[86] On the status generally of such prisoners of war, *see*, Oppenheim, *op. cit.*, Vol. II, pp. 726-738; Greenspan, *op. cit.*, pp. 561-562; and Rousseau, *op. cit.*, pp. 403-404.

[87] *See, e.g.*, Conclusion No. 27 (XXXIII) of the Executive Committee of the UNHCR Programme, which "expressed its profound concern at the problem of continuing military attacks on refugee camps and settlements". These attacks have occurred in many different regions of the world.

In 1982, at the request of the Executive Committee the High Commissioner for Refugees appointed a former High Commissioner, Ambassador Felix Schnyder, to carry out a survey of the various aspects of the problems of military attacks. The Executive Committee expressed the hope that this survey would lead to an adoption of measures "which would make refugee camps and settlements safer from military attacks than they have so far been".[88]

Ambassador Schnyder presented his report in March 1983 at a special session of the Executive Committee.[89] In it, he made a number of observations about the improvement of the physical protection of refugees.

He commented that the High Commissioner must make every effort to promote conditions which ensure that refugees in camps and settlements are not exposed to the danger of military attacks. This might require refugees to be settled away from the frontiers of States from which such attacks emanate. Measures by governments of asylum countries and other actions might also be called for in order to ensure that refugees do not become involved in activities likely to bring about such attacks.

In order that the High Commissioner could promote conditions of safety for refugee camps and settlements, it is of the utmost importance to maintain a regular presence in refugee camps and settlements which might be exposed to military attacks. He said that the High Commissioner could also give consideration to a possible initiative *vis-a-vis* governments in consultation with the International Committee of the Red Cross to provide refugee camps and settlements with a protection analogous to that defined in the IVth Geneva Convention of 12 August 1949 and Additional Protocols I and II of 8 June 1977 relative to the protection of civilian persons in time of war. He added that both before and after a military attack on a refugee camp or settlement had occurred, it was important for the High Commissioner to maintain contact with all the parties concerned with a view to carrying out his humanitarian tasks. The High Commissioner should also maintain contact with the political organs of the United Nations with a view to coordinating any action which might be necessary either before or after a military attack had taken place.

The subsequent discussion of the report and of the draft Declaration was complicated to some extent by a problem not alluded to specifically by Ambassador Schnyder in his report — that of camps or settlements composed in whole or in part of armed combatants. Largely because of this problem, no agreement could be found in the time available at the thirty fourth session of the Executive Committee in October 1983 to reach agreement on a draft

[88] Conclusion No. 27 (XXXIII), para. (d).

[89] EC/SCP/26.

statement of principles on the Prohibition of Military and Armed Attacks on Refugee Camps and Settlements.[90]

In regard to the question of the mutual rights and duties of the country of refuge and of the country or origin in relation to the activities of refugees, the 1951 United Nations Convention is silent.

It states only that:

> "Every refugee has duties to the country in which he finds himself, which require in particular that he conforms to its laws and regulations as well as to measures taken for the maintenance of public order";[91]

and:

> "Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in face a refugee and that the continuance of such measures is necessary in his case in the interests of national security".[92]

The 1969 OAU Convention, which specifically envisages situations of external aggression, occupation, foreign domination or events seriously disturbing public order existing in neighboring countries, contains a similar provision to that in Article 2 of the 1951 United Nations Convention, with the additional provisions that:

- every refugee shall abstain from any subversive activities against any Member State of the OAU; and
- States parties undertake to prohibit refugees residing in their respective territories from attacking any State member of the OAU, by any activity likely to cause tension between Member States, and in particular by use of arms, through the press, or by radio.[93]

In the 1954 Inter-American Caracas Convention on Territorial Asylum, Article 8 provides that:

> "No State has the right to request that another State restrict for the political asylees or refugees the freedom of assembly or association which the latter States' internal legislation grants to

[90] *See*, Conclusion No. 32 (XXXIX). [91] Art. 2.

[92] Art. 9. In the Declaration on Territorial Asylum adopted in 1967 by the United Nations General Assembly, on the other hand, Article 4 provides: "States granting asylum shall not permit persons who have received asylum to engage in activities contrary to the purposes and principles of the United Nations".

[93] Art. 3.

all aliens within its territories, unless such assembly or association has as its purpose fomenting the use of force or violence against the Government of the soliciting State".

If the grant, or the continuation of the grant of protection is to be considered a peaceful and friendly act — a principle which has been asserted consistently in international instruments — it would seem to follow logically that the State granting protection must take all reasonable measures within its power to ensure that the refugees do not commit acts engaging the responsibility of the State because of their wrongful nature.

This consideration may be pertinent particularly where women, children and other innocent persons are found in camps or settlements in which unlawful subversive or other activities are being conducted by elements within the refugee population. The existence of these activities can expose the refugee population to military measures taken in self defense or in reprisal, thereby endangering the lives of the entire refugee population. It is also axiomatic that in such cases, civilian refugees should not be used by combatants as a screen or buffer zone behind which military attacks are organized. The non-military character of refugee camps, enforced, if necessary, by action of the authorities of the country of protection, may be the best guarantee in practice that the inhabitants of the refugee camps will not be exposed to attack.

Another consideration might be whether the authorities of the country providing protection should not also take all measures possible to protect the rights of those refugees who had been, or who might be, induced against their will to engage in military or other activities organized or conducted by elements within the refugee population.[94]

By the same token, it would seem necessary to state unequivocally that indiscriminate or otherwise unlawful attacks on refugee camps are inhuman and gravely wrongful. Fundamental among the rules of humanitarian law — which are of general application — are that persons who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. Furthermore, it is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering; and parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Finally, neither the civilian population as such nor civilian persons may be the object of attack; and attacks must be directed solely against military objectives.[95]

[94] On this, *see*, the Report of the Working Group on Current Problems in the Protection of Refugees and Displaced Persons in Asia, San Remo, 1981, p. 15.

[95] *See*, "Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts",

The observance of these rules of humanitarian law must be supplemented, of course, by respect for the rules of international law generally which apply to the use of force by States.

In regard to the question of the location of refugees, there is no provision on this aspect in the 1951 Convention relating to the Status of Refugees; but the 1969 OAU Convention, with its wider scope of application, provides in Article II (b) that:

> "For reasons of security, countries of asylum shall, as far as possible, settle refugees at a reasonable distance from the frontier of their country of origin".

In the 1954 Inter-American Caracas Convention on International Asylum, Article 9 provides:

> "At the request of the interested State, the State that has granted refuge or asylum shall take steps to keep watch over, or to intern at a reasonable distance from the border, those political refugees or asylees who are notorious leaders of a subversive movement, as well as those against whom there is evidence that they are disposed to join it. Determination of the reasonable distance from the border for the purpose of internment, shall depend upon the judgment of the authorities of the State of refugee".

The basis of these provisions would seem to be the concern that the location of refugees close to the border of the country of origin can create tension between the State of protection and the State of origin as well as endanger the lives and safety of the refugees.

This concern would seem to be particularly relevant to the consideration of "safe havens" and other proposals for the establishment of "buffer zones" or the demilitarization of border areas by means of refugee agglomerations.

In regard to the general problem of physical safety and the activities of refugees, it should be added that a problem concerning safety or security can properly be seen, in most instances at least, as a manifestation of the refugee problem as a whole. Armed attacks on refugee camps are rarely the initial point of the development of a refugee problem: they are usually occurrences which follow on events or circumstances which gave rise to the refugee flow and which continue to cause a refugee situation. A satisfactory and lasting solution to a problem of armed attacks, therefore, may well require a solution to the basic underlying problem represented by a refugee situation. As a consequence, a comprehensive approach to the safety and security problems of the refugee situation may ultimately necessitate treatment of all the relevant aspects, including causes, prevention and final solution. Only in that larger

1979. International Committee of the Red Cross and the League of Red Cross Societies. These fundamental rules are derived from the Geneva instruments on humanitarian law applicable in armed conflicts.

context will even the protection concerns be dealt with adequately.[96]

The existence in the world today of so many refugee populations, many of them living for months or years in primitive, makeshift accommodations and confined indefinitely to camps or agglomerations of dwellings, sometimes in conditions of great hardship and danger, points ineluctably to the primordial humanitarian and social importance of solution. Such situations of destitution and abandonment produce great human suffering and over time are potent breeding grounds of disorder and violence.

In its widest notion, solution should be seen as not only a response after a refugee flow has occurred but also as a response to the refugee problem as a whole. As it was observed recently in a meeting of the International Institute of Humanitarian Law in San Remo, the refugee problem in its entirety consists not only of the intermediate aspects of protection and assistance but also of causes, prevention and final solution.[97]

A response to the causes of a particular refugee situation may be necessary not only to obtain the solution of return — which, in principle, is the best solution — but also to avert a further flow where the transfrontier movement has not ended but is continuing. Many large-scale refugee flows take place over a period of months, sometimes years.

Since prevention has been, until recently, a much neglected aspect of the refugee problem, it may be instructive to consider briefly the theoretical basis for a preventive approach.

A refugee flow is often only a small aspect of a much larger human problem. Those who escape a dangerous situation in a country of origin such as an armed conflict may be only a small minority compared to those who cannot leave and who finally fall victim to the internal danger. The protection of the refugees, therefore, is usually only a late and inevitably partial response to the danger as a whole. Furthermore, flight or expulsion may create its own dangers for those leaving,[98] and the circumstances in which the refugees may find themselves in their country or refuge may hardly constitute a satisfactory lasting solution. In any event, exile is rarely a satisfactory solution to a social problem.[99]

[96] This aspect is treated in C.J. Coles, "The Question of an International Approach to Resolving Security Problems in the Refugee Situation", an article to be published shortly in the first issue of the 1983 Yearbook of the International Institute of Humanitarian Law, San Remo. This broad approach was adopted by the IXth Round Table on Current Problems in International Law, San Remo, 1983. *See*, its Conclusions on Physical Safety, the Activities of Refugees and National Security.

[97] *See*, Conclusions on Physical Safety, the Activities of Refugees and National Security of the IXth Round Table on Current Problems in International Humanitarian Law, San Remo, 1983.

[98] *E.g.*, the number of drownings which occurred during the exodus of Vietnamese by boat in South East Asia which has been variously estimated between 50,000 and 200,000.

[99] On the humanitarian and social problems of mass expulsion, *e.g.*, *see*, the Report of the

The receiving country may feel threatened by the influx of large numbers of persons leaving an armed conflict situation in a neighboring country. It may fear for both its external and internal security. Also, it may consider the direct or indirect expulsion of inhabitants of a neighboring State as an unfriendly act and may take measures against the country of origin in reprisal or self defense. The frustration, bitterness and despair of persons forced to leave their homes and go face a bleak and uncertain future may also lead to violence in the receiving State which finally endangers the peace and security of other countries, including the country of refuge. A receiving country may also resent a situation where the main weight of the international concern is placed on the situation in the receiving country and on its obligations but not on the situation in the country of origin which is the source of the refugee problem.

It is indisputable that, in principle, prevention is better than cure. What has been lacking so far is not the acceptance of the primordial importance of prevention but the willingness to determine the principles and the practical measures necessary to give effect adequately to the preventive concern. However, the effort to do so has at last begun with the recent initiative of the government of the Federal Republic of Germany to examine international cooperation to avert further mass flows of refugees and the contemporaneous initiative of Canada to examine the causes of mass exoduses.

At the legal level, much remains to be done in the area of prevention. For example, an international instrument on the prohibition of mass expulsion or deportation may be particularly valuable and timely. Expulsion and deportation should be defined in a way which is adequate to cover all forms of pressure used to force the departure of people. The question of State responsibility for refugee flows is also one that has long been waiting adequate study. (This study should examine, *e.g.*, the question of obligations arising from wrongful conduct, particularly in continuing situations. It should also examine the general question of international cooperation to avert further mass flows of refugees in the light of the human and social principles relevant to coerced movements.)

A more effective preventive approach will undoubtedly also facilitate, in practice, the obtaining of the solution of voluntary repatriation. It may also facilitate the protection of refugees in the country of refuge.

The protection of refugees should never be seen as an adequate substitute for the protection generally of the human being within his country of origin. In particular it must be recognized that, in a time of grave disorder and widespread violence, the willingness of States to extend refuge to the many victims of such a state of affairs may become impaired. Even those who find

Working Group on Mass Expulsion, International Institute of Humanitarian Law, San Remo, 1983, and the Background Paper prepared for the Working Group by G.J.L. Coles, "The Problem of Mass Expulsion", San Remo, 1983.

refuge in a neighboring country are often still caught up in the situation of disorder and violence in their country of origin as the effects and even the causes of this state of affairs may be found beyond the borders of the country of origin.

The protection of refugees, therefore, requires some degree of equilibrium between the different parts of the protection system for the human being as a whole.

Furthermore, in order to be balanced and humane — let alone effective — refugee law must be seen as an integral part of the system of law as a whole. This system includes not only human rights and humanitarian law but also the basic principles relating to such fundamental aspects of social order as the sovereignty and independence of States. The more effective application of the entire system of law to the refugee problem completes the protection of the refugee by adding to the rights and duties of the country of refuge or asylum in regard to the refugee, the rights and duties generally of the country of origin and of other States in relation to a refugee problem. The balanced and progressive development of both the humanitarian and social dimensions of the international response to the refugee problem can only contribute finally to the greater effectiveness of refugee law as a whole, including protection.

The gravity of the refugee problem can be seen, from both a humanitarian and a social perspective, as providing by itself a sufficient reason to develop the international response generally to human crises, in times of peace as well as of war. In particular, it is important for the international community to develop the means to intervene in a more timely and effective manner to defuse situations which, if allowed to continue, would lead to even graver human and social consequences — including massive and disorderly trans-frontier movements.

All this can be said without any necessary implications for the responsibility and function of any particular international body in regard to all the aspects of the refugee problem. There are clearly limits to what *e.g.*, the Office of the United Nations High Commissioner for Refugees can do while performing its own principal mandated functions effectively. It implies only that international action as a whole, as regards to the full range of relevant and competent international bodies, at the universal and regional levels, must be addressed to the totality of the refugee problem, if the international response to the refugee problem is to be adequate and effective. It is self evident, too, that such action must, if necessary, be determined and coordinated at some central point in the international system.

The aspect of solution and the question of its relationship to protection and assistance are among the least examined issues concerning international action in aid of refugees. In particular, the question of "solution" has never

been adequately examined in a legal framework. What, for example, does refugee law have to say about what is or what is not a solution?

In the view of this writer, a situation arising as a consequence of transfrontier placement can only be regarded as a solution to the humanitarian problem of the displacement if it satisfies certain minimal human rights requirements relating to indefinite or permanent residence. What such minimal rights are was indicated by, *e.g.*, the 1951 United Nations Convention in regard to all its provisions relating to lawful stay. These provisions involve rights relating to employment, freedom of movement and welfare.

A situation where these minimum legal requirements are not met cannot be considered a solution to a displacement problem. At best, it can only be considered as a temporary measure, requiring action addressed to obtaining an eventual solution, whether in the country of origin, the country of refuge or another country.

The solution of voluntary repatriation is one of the least examined aspects of the international response to the refugee problem. It is, however, an important aspect, particularly in the context of massive displacement as a result of armed conflict. In the case of such displacement, the solution is often that of voluntary repatriation. This solution may be complicated, however, by the existence of a significant factor of persecution, at least as far as some of the refugees are concerned.

The development of the principles of international cooperation for effecting satisfactorily the solution of voluntary repatriation is, in the view of the writer, an aspect now requiring urgent study.[100]

So far in this paper the problem of national security has not been considered. It would, however, be unrealistic and perilously shortsighted to ignore the factor of national security in the context of mass flows occurring during the course of armed conflict or serious internal disturbance. Such flows are often of a complex and difficult nature, affecting the relations between States and, sometimes, the security of both the receiving State and the State of origin as well as that of other States.

It should not be forgotten that in any legal system the individual and the community are the two main pivotal points around which the content of law is determined and that even at the best of times an equilibrium between the rights, duties and interests of individuals and of communities is not easy. The task is even more difficult in times of general violence and disorder. In such times, factors such as fear tend to come strongly to the fore, placing a primordial value on social necessity and inhibiting the humanitarian response. The efficacy of a legal system in maintaining humane values is dependent

[100] Certain general observations were made in 1980 by the Executive Committee of the UNHCR Programme. *See*, Conclusion No. 18 (XXXI).

upon a certain minimum degree of assured peace and order. A growth in violence and disorder generally endangers inevitably the efficacy of the entire legal system. By their natures, law and violence are uncomfortable bedfellows; and in their essence they are contradictions in terms.[101]

Refugee movements mainly take place within a region. Certain national problems have direct implications for some, at least, of the other countries of a region, and transfrontier movements as a result of armed conflict or serious internal disturbances may carry far-reaching political and security implications. Particularly acute can be the problems arising from a movement into a country whose predominant political system is in sharp contrast with the political values and aspirations of those who seek to enter it and which is in close alliance with the authorities in the country of origin. Frequently, in such situations, allied countries refuse refuge to each other's dissidents and even seal their frontiers completely in times of general crisis.

Hardly less acute can be the problems of a massive movement across the boundaries of civilizations and history. By its nature, a mass movement of this character normally poses basic political questions.

These considerations underline the fundamental importance of prevention.

As much as every normal person must hope that the world will be spared the horrors of a nuclear war, the effects of such a major disaster on the transfrontier movements of surviving populations and the consequences of such movements for the persons and communities affected are questions that cannot be ignored. There is enough information on the effects of a nuclear war, published by the United Nations and elsewhere, to speculate usefully about the possible effects on transfrontier movements, although it seems that so far this aspect has not been studied in any depth.[102]

The evidence of experts suggests that as a result of a nuclear exchange, whether of a limited or a total kind, there would be in some affected regions a significant possibility of transfrontier movement or attempted movement of historically unparalleled dimensions. Factors directly inducing movement among the survivors of national populations could be such grave consequences as the contamination and, even, the adverse modification of the environment, infectious diseases, famine, extreme physical hardship, social chaos and economic collapse. Fear of further attacks could be another precipitating factor. As the recent report of the United Nations Group of Experts on a Comprehensive Study on Nuclear Weapons suggests, indirect factors might

[101] A fundamental purpose of law is the maintenance and promotion of peace and justice. Violence, therefore, represents the absence of legal order.

[102] *See, e.g.*, the Report of the United Nations Group of Experts on a Comprehensive Study on Nuclear Weapons submitted to the Secretary-General on 12 July 1980, A.35/392.

be the psychological consequences to the surviving population, resulting in erratic, non-social behavior, aggressiveness or apathy. Conflicts that exist even in peacetime between ethnic, racial and religious groups, and possibly even political factors within certain countries, could come out into the open following the deprivations, stresses and disorganization of the post-attack period.

In such a grave situation, concern for national security or public health could well lead to the complete closing of borders, insofar as borders continued to have any meaning, and to the turning back or expulsion *en masse* of fleeing people, with fearful consequences easily imaginable in some situations.

The contemplation of such an apocalyptical situation would be altogether pointless and even counter productive if it were not for the fact that a nuclear war is a distinct possibility. Nuclear war is a major contemporary issue posing grave and persistent questions concerning the progressive development of the political, legal, social and economic order of the world; and it is directly relevant to almost any aspect of international life, not least the transfrontier movements of people.

The serious humanitarian and social problems which are reflected and created by transfrontier movements as a result of violence and disorder argue strongly by themselves for an international response which is directed fundamentally to the root causes of these movements. It is far beyond the scope of this paper to consider in any detail what that response should be. But what should be said, at least, is that it should be directed basically to the conscientious implementation by all States of the purposes and principles of the United Nations Charter and to a sincere and courageous commitment to the development of international solidarity in the creation of a more peaceful and just world, where want, oppression and violence are gradually reduced and, one day, largely eliminated. As Pope Paul VI said nearly twenty years ago in his encyclical "On the Development of Peoples", the new name for peace is the development of mankind.

The perception of what is required to meet today's refugee problem entails that the international approach to the refugee problem must not be focused entirely on it as if it were somehow different and separate from more general problems of peace and justice. Underlying the approach must be a dynamic and positive attitude to the general question of peace and justice in the world. Concentration on social disorder of the magnitude being experienced by the world today which is confined to a curative optic and which is not enlarged to include the preventive dimension is bound by the nature of the problem to prove disastrously inadequate. The strength and the power to respond to the refugee problem can only come finally from a general vision of what is right and good.

The last part of these reflections are taken from the prophet Ezekiel:

> "Say, therefore", the Lord Jahweh says this: "Yes, I have sent them far away among the nations and I have dispersed them to foreign countries; and for a while I have been a sanctuary for them in the country to which they have gone". Then say this: "The Lord Jahweh says this: I will gather you together from the peoples, I will bring you all back from the countries where you have been scattered and I will give you the land of Israel. They will come and will purge it of all the horrors and the filthy practices. I will give them a simple heart and I will put a new spirit in them; I will remove the heart of stone from their bodies and give them a heart of flesh instead, so that they will keep my laws and respect my observances and put them into practice. Then they shall be my people and I will be their God" (Ezekiel 11, 16-21).

SUMMARY OF REFLECTIONS

The extended OAU definition of a "refugee" is consistent with the realities which now exist in other regions of the world; although the steady deterioration in social and economic conditions of some areas have provided additional significant causes of external displacement. Today, armed conflicts and serious internal disturbances are worldwide phenomena. A significant feature of many armed conflict situations is the multiform aspect of the danger which they pose for human beings. In addition to the perils and hardships which the deliberate and controlled pursuit of military objectives may inevitably create for the civilian population as well as for combatants, there is also the danger of uncontrolled or random acts of violence and of a serious general deterioration of social, economic and physical conditions. In recent times, drought and famine have once again become significant causes of transfrontier movement; and they are often accompanied by disease. Behind these movements have been grave problems of economic and social development, aggravated in some cases by serious internal disturbance and external intervention. The traditional Western undertstanding of "persecution" as the main cause of refugee flows is now manifestly inadequate as a principle for universal application.

A characteristic of a general situation of armed conflict is the frequently awesome size and rapidity of the final exodus. The massive size of the larger movement normally precludes the possibility of individual determination of status. Where an individual determination is possible and necessary, a general right of refuge should be recognized where the movement is coerced, *i.e.*, in the case of a grave and urgent necessity. A threat in any form to life, physical integrity or freedom should be regarded as a grave form of danger, and refuge should be granted in such circumstances, at least for the duration of the danger. Basic, minimum standards for the protection of such persons must be

reaffirmed and developed by the international community. In the view of the writer, the liberation of international refugee thinking from undue rigidity, particularly in respect of the question of solution, frees the term "refugee" from unnecessary and unhelpful encrustations which serve only to hamper the use of a term generally applied to all forms of coerced movements of nationals.

In regard to the relationship of the law of neutrality to refugee law, which has hitherto been largely an unexamined question, the view taken by the writer is that the rules of the former law should be seen as applying in the case of combatants to the mutual fields of application to the Protocols additional to the 1949 Geneva Conventions, and to the rules of refugee law as applying generally to civilians or civilian populations, whether in times of armed conflict or not.

The problem of the physical safety of refugees should be seen as related to the problem of activities of refugees. If the country of origin must respect the basic rules of international law concerning the use of force and the conduct of military operations, the State granting refuge must take all reasonable measures to ensure that the refugees do not commit acts engaging its responsibility because of their wrongful nature. As a problem concerning physical safety and the activities of refugees can be seen in most instances as a manifestation of the refugee problem as a whole, a satisfactory and lasting solution to the problem may require a solution to the basic underlying problem represented by a refugee situation. Only such a comprehension will take sufficient account of even the protection concerns.

The existence in the world today of so many refugee populations living in destitution or under other adverse conditions underlines the primordial importance of solution. In its widest notion, solution should be seen as not only a response after a refugee flow has occurred but also as a response to the refugee problem as a whole, including causes and prevention.

National security and other problems which may arise as a result of massive flows from situations of armed conflict or serious internal disturbances underline the fundamental importance of prevention. The international response to the root causes must be directed basically to the conscientious implementation by all States of the purposes and principles of the United Nations Charter and to a sincere and courageous commitment to the development of international solidarity in the creation of a more just and peaceful world, where want, oppression and violence are gradually reduced and, one day, largely eliminated.

12

Comments on the Presentations by James Purcell, Leon Gordenker and Gervaise Coles

DENNIS GALLAGHER*

I appreciate the title of Jim Purcell's remarks "Overseas Assistance vs Domestic Admission". Although, I think, I would have said "And" rather than "Versus". One of the most difficult things to achieve in an emergency humanitarian program like the refugee program is balance and perspective. It's a terribly emotional program with people quick to line up on one side or another of issues. Further, both the domestic and international contexts are complex and change rapidly making it difficult to reach timely consensus and decisions.

Within the U.S. refugee resettlement program a balance needs to be maintained between meeting emergency humanitarian needs generated overseas and paying adequate attention to domestic considerations such as costs, impacts and domestic assistance program effectiveness. I think it is safe to say that, since 1979, the trend has been toward increased orderliness and control in admissions, in orientation and training, in placement and in program planning and services. Relative to 1979, domestic considerations have come increasingly into play. There is a certain inevitability about these developments; in most respects, they are for the good.

The question I have is: are we retaining sufficient flexibility and capability to respond effectively to humanitarian crises that require a resettlement response? It is not just a question of total numbers — although that is part of it — it is also a question of policies and procedures and the steps and phases that are established to implement a resettlement response.

In the last two or three years, these procedures and phases have become much more developed and complicated; I wonder if it isn't possible to conceive of situations where the administrative requirements of the resettlement system might present as many limits to admissions numbers and to rapid response to crises as do some political considerations. As the resettlement numbers decline and the resettlement structures go through some inevitable

* Director, Refugee Policy Group, Washington, D.C.

dismantling, will we retain a balanced interest and capacity both for emerging response as well as for effective resettlement and integration?

It is probably true that the attention on the Indochinese prgram tended to focus a majority of attention on resettlement rather than on other possible solutions to refugee problems — such as voluntary repatriation or settlement in place. In resettlement programs, there is always the likelihood that the commitment to resettlement can have self-perpetuating aspects. This is particularly the case where you are talking about movements from poor to rich countries.

How can a balance be achieved where the genuine needs of persecuted people for protection and assistance are tended to and, where the concerns of countries of asylum and resettlement to limit the numbers of people coming to them are also respected?

My view is that the U.S. has done a responsible and balanced job of managing the U.S. admissions numbers to date. Significant exceptions, however, occurred at the end of FY 1981 when 20,172 Southeast Asians were admitted in one month, and again in FY 1983 when refugee admissions from Southeast Asia totaled only 58 percent of the allowable ceiling, in spite of continued pressure from Southeast Asian countries of first asylum at levels agreed to in the consultation process. Still, we need to be vigilant that recent efforts to scale down resettlement numbers from the peak levels of 1979-81 in an appropriate manner do not evolve into a restrictionist and hard-hearted "never again" mentality. Flexibility needs to be retained in both attitudes and program procedures.

There is obvious sensibleness in trying to address refugee problems in the areas and regions of the world from which they emanate.

We should not be over eager to commit that the solutions lie here rather than there. Achieving a balanced perspective between resettlement and other alternatives for dealing with refugee crises is an important priority. However, it should be recognized that resettlement — while it is initially costly and controversial — does provide actual durable solutions to refugee problems.

Internationally, we have recently found repatriation to be a less viable option relative to the past. Similarly, many — perhaps most countries of first asylum — are reluctant to afford more than temporary sanctuary to mass movements of people seeking asylum and often, only withir. the confines of camps or even detention centers. (This includes the United States.)

In trying to balance an equation between admissions for resettlement and international assistance, the degree to which durable solutions are likely to be accomplished is an important factor to be taken into account. Money and effort spent on resettlement typically does lead to solutions. Increased attention on international assistance needs to be focused on solutions too. The last thing we need are more agglomerations of permanently stateless people being provided temporary asylum in the developing world. The long-term con-

sequences of this are unpredictable and volatile, to put it mildly.

Whether we have the diplomatic skills, international structures and agreements and program creativeness to be able to encourage actual solutions to refugee problems through international assistance is a real question. International assistance may include:

- Efforts to increase the percentage of UNHCR monies spent on durable solutions;
- International discussions regarding potential program relationships between refugee assistance and development assistance; and
- The upcoming International Conference on Assistance to Refugees in Africa (ICARA II).

All provide opportunity to see whether the capacity to achieve acceptable solutions through international assistance can be improved. Circumstances such as those in Pakistan, in the Middle East, those along the Thai-Cambodia border and, increasingly, those in Central America, however, represent incredible challenges.

I particularly appreciated Lee Gordenker's excellent remarks on a very difficult but, important topic. Many people associated with the refugee area believe that improved early warning and early response capabilities are fundamental to reducing, and effectively handling refugee problems.

Policy and program decisions made early on in handling a refugee emergency do set a context for longer term options and actions. I think we all recognize what a complicated business this is, since devising early warning and response capabiltities challenges all our political, bureaucratic and technical skills. In other words, it's probably not achievable in any comprehensive and systematic sense. Yet, I think working on and toward improving these capabilities is of the greatest importance; it forces us: to confront the limitations of current international bureaucratic arrangements; to confront our lack of political will; to use the institutional bases and agreements we do have to address refugee crises effectively and; to address our technical ability to collect, share and validate data and information on potential or actual refugee situations from around the globe.

To the extent we work on this capability, the role and resources of the private sector can not be ignored. Imagine if only governments had this capability. My imagination takes me to a circumstance where a government would warn of hordes of feet people trekking north from nameless countries in the south, following a communist takeover but, ignore the realities and statistics regarding those who already have undertaken such a journey resulting from current circumstances.

It is fortunate that, in fact, elements of an early warning and response capability do exist, both in governments and in private organizations. I believe further effort to advance these capabilities is well worth it.

Finally, in regard to Gervaise Cole's presentation, I will be brief: his comments simply underscore the reality that the world is an increasingly dangerous place for civilians; ordinary people, increasingly, are caught up and victimized by larger events. They further underscore that increasing numbers of people who are jeopardized exist outside the reach of international agreements and systems of protection and assistance. Refugees are in a privileged situation relative to displaced persons and, displaced persons are privileged relative to those who exist on the periphery of, but not within the reach of even these inadequate and limited efforts at assistance.

The Unprotected: The Displaced in El Salvador

ARTHUR C. HELTON*

VAST numbers of persons around the world who are fleeing from armed conflict and civil war have no prospects for protection or humanitarian assistance. Many are the so-called internally displaced — those who have been dislodged from their homes by the violence but who have not left their country of nationality. They have no recourse to international refugee law nor ordinarily to international relief agencies.[1] They are the unprotected.

The plight of the displaced in El Salvador was recently the subject of a mission of inquiry by the Lawyers Committee, which found a number of very disturbing long-term legal protection problems. The findings and recommendations of the mission, supplemented by subsequent investigations, provide a dramatic description of the problems of this vast group of victims, and possible approaches to ameliorate those problems, at least for the displaced in El Salvador.

THE MISSION

In January of 1984, a mission co-sponsored by the Lawyers Committee and the Americas Watch Committee visited El Salvador to examine the situation of displaced persons in that country.[2] While in El Salvador, the delegation

* Director, Political Asylum Project, Lawyers Committee for International Human Rights, New York.

[1] *See, e.g.*, "The United Nations Protocol Relating to the Status of Refugees", *U.S.T.*, Vol. 19, No. 6233, 1967; T.I.A.S., No. 6577, 1967; *U.N.T.S.*, Vol. 606, 1967, page. 267.

[2] The author headed the Lawyers Committee delegation, which also included Nan Burton, Executive Director of International Voluntary Services, and Jemera Rone, a New York ; lawyer associated with the firm of Skadden, Arps, Slate, Meagher & Flom.

The Americas Watch delegation was headed by Aryeh Neier, Vice Chairman of Americas Watch, and included Cynthia Arnson, consultant to Americas Watch, and Dr. Victor Penchaszadeh, a pediatrician and specialist in maternal and child health at the North Shore University Hospital in Manhasset, New York. The joint delegation visited El Salvador from January 8-15, 1984.

met with a number of officials of the government of El Salvador responsible for programs dealing with displaced persons, including Colonel Luis Alonso Amaya Arevalo, head of CONARA[3] Dr. Mario Humberto Claros, manager of CONADES,[4] and Ingeniero Armando Flamenco, General Director of DIDECO.[5]

The delegation also met with representatives of private voluntary agencies who assist displaced persons in El Salvador, including the Salvadoran Evangelical Committee of Assistance and Development (Comite Evangelico Salvadoreno de Ayuda y Desarrollo) ("CESAD"), the International Committee of the Red Cross ("ICRC"), the Salvadoran Red Cross, Caritas, Catholic Relief Services, the Social Secretariat of the Archdiocese of San Salvador, the Mennonite Central Committee, the Lutheran Church, Save the Children (Desarrollo Juvenil Communitario), and other church and private voluntary organization representatives.

The delegation also conferred with the human rights monitoring office of the Archdiocese of San Salvador, called the Office of Legal Protection (Tutela Legal), and other Salvadoran human rights organizations; with academicians from the University of Central America Jose Simeon Canas in San Salvador and the School of Medicine of the National University; and with other individuals concerned with the displaced, including Raul Molina Martinez, First Vice President of El Salvador, who has formed a private group to assist the displaced.

Finally, the delegation met with Ambassador Thomas Pickering and with other officials of the Embassy of the United States in San Salvador, including officials of the U.S. Agency for International Development ("AID") program in El Salvador. Meetings were also held with AID and State Department representatives in Washington, D.C., including representatives of the Refugee Bureau, the Bureau of Human Rights and Humanitarian Affairs, and the Refugee Coordinator's office.

THE SITES VISITED

While in San Salvador, the delegation visited nine displaced person locations, including eight camps, which, according to the AID Mission, were representative of the wide variety of living situations in which displaced persons have sought protection and care, particularly in and around San Salvador. The camps and locations were Fe y Esperanza (assisted by the Lutheran Church), the seminary of San Jose de la Montana and San Roque Church (run by the Archdiocese), Santa Tecla (assisted by a Roman Catholic parish

[3] The National Commission for the Restoration of Areas (*Comision Nacional de Restauracion de Areas)* is known as CONARA.

[4] The National Commission for Assistance to the Displaced (*Comision Nacional de Asistencia a la Poblacion Desplazada)* is known as CONADES.

[5] Community Development (*Desarrollo de la Comunidad).*

priest), and San Marcos (assisted by CONADES), all in the area of San Salvador.

Outside of San Salvador, in the department of La Libertad, the delegation visited the Bethania camp (run by the Medecins du Monde) and the town of La Libertad, where the displaced live in non-camp situations, assisted by Roman Catholics from the Cleveland Mission Team. In San Francisco Gotera in the eastern department of Morazan, two camps were visited, El Tiangue and El Campo, both supervised by Roman Catholics of a Welsh Franciscan Order.

Finally, the delegation interviewed five relief workers imprisoned in Mariona and Ilopango Prisons in San Salvador.

OUR FINDINGS

The 257-page report of the joint mission, issued in April of 1984 and entitled *El Salvador's Other Victims: The War on the Displaced*, found that approximately 500,000 Salvadorans — about 10 percent of El Salvador's population — have been forced to flee their homes but have remained within their country's borders. Unlike those who have left the country and who are covered by international refugee law, these people are known as displaced persons. While we are concerned with the obvious humanitarian needs of these people — lack of adequate food, shelter, and medical care — we are particularly concerned with their need for legal protection. In the course of our investigation, we discovered that many of the hardships which the displaced in El Salvador suffer derive from their lack of legal protection.

Our prinicpal finding is that many of the internally displaced persons who are not officially registered with the Salvadoran government — approximately 200,000 people — are subjected to deliberate attacks by the Salvadoran armed forces, including at least some attacks in conflicted areas where the International Committee of the Red Cross has been providing humanitarian assistance. Such attacks take place despite the fact that virtually all these people are women, young children, and elderly people; despite the fact that they are helpless and defenseless; and despite the fact that respected international voluntary organizations and religious groups attempt to provide them with care and protection. The forms of attack range from aerial bombardment to abduction, torture, disappearance and murder.

As far as we can determine, these attacks take place because the Salvadoran armed forces consider many displaced persons to be sympathizers with the guerrillas, or — preposterous as it may seem in connection with a population almost entirely comprised of infants, young children, their mothers, and the elderly — themselves active guerrillas.

The attacks are not limited to the displaced persons alone. Refugee workers, medical personnel and others who come in contact with the displaced are viewed with great suspicion and often face harassment and direct attacks by

government armed forces. Thus, *e.g.*, in July of 1983, six relief workers associated with camps run by the Archdiocese were abducted and tortured. Two were released shortly thereafter. A third, Gustavo Adolfo Zelada, was released in February, and left the country. The other three, Dinora Rodriguez de Coto, her husband Marco Antonio Coto Vega, and Roxana Guadelupe Funes were finally released in March 1984, after a number of international appeals on their behalf. All three immediately fled into exile.

Dr. Angel Ibarra, who treated the displaced in a camp run by the Lutheran Church, was detained and tortured in April 1983. When he was released after six months, six others associated with the relief efforts of the Lutheran Church were detained; one of them, Ramon Grande Garcia, was just recently released after being tortured.

The violence and harassment inspired by government mistrust of the displaced creates a vicious circle, for, the reason that so many of the displaced in El Salvador have not registered with the government is fear. We found that they are afraid to give their names, relationships and places of origin to the Salvadoran authorities because they believe that to do so would invite reprisals.

Thousands of the displaced therefore are unwilling to apply for food and medicine from the Salvadoran government's relief programs (CONADES and CONARA) because they fear that registration will lead to persecution by the military, which is structurally involved in the registration process. No arrangements are made to protect the confidentiality of information relating to the recipients of assistance, nor to guard against misuse of that information by the Salvadoran military. As a result, many of the displaced make a grisly choice and forego the possibility of receiving humanitarian assistance in return for what they perceive to be greater physical safety by avoiding the registration process.

We found, in addition, that the policies of the United States in El Salvador contribute to the victimization of the displaced. The United States sanctions the labelling of many of these displaced as guerrilla sympathizers or supporters, including almost 80,000 displaced persons assisted by the ICRC in zones not controlled by the government. When incidents of Salvadoran Air Force aerial bombardment on those displaced who gathered to receive medical assistance from the ICRC were reported to U.S. officials, they replied in essence that there were no displaced in those zones but merely *masas guerilleras*, or those they labelled "civilian logistical supporters of the guerillas". The official U.S. denial that there is a problem unfortunately may encourage the Salvadoran armed forces to continue bombing conflicted areas with impunity and without regard to the presence of civilian noncombatants.

The United States government also errs when it makes aid available only to those displaced persons who are registered with the Salvadoran government. By this practice, the United States refuses to acknowledge that the unregistered

displaced have legitimate reasons for their fear. The United States thus perpetuates the Salvadoran system of discrimination against allegedly subversive homeless women, children, and elderly people.

Even the registered displaced are not exempt from abuse by the Salvadoran government. Some of them in the San Vicente and Usulutan provinces have been threatened with forced relocation into conflicted areas as part of a "pacification" program. This includes threats to cut off food if the displaced do not relocate. In effect, they are dealt with as expendable pawns in an effort to create populated buffer zones between the armed forces and the guerrillas. Placing the displaced at risk in furtherance of a military strategy is inhumane, and it violates the law of war. Again, the policies of the United States in El Salvador contribute to this victimization of the displaced who are relocated into conflicted areas.

Those displaced by the conflict in El Salvador have suffered family disruption and extreme personal hardship. A large number of these people have sought to escape the war by finding refuge in other countries. Many of the displaced persons who have remained in El Salvador today live in the most impoverished circumstances, often herded together in camps in which they are virtual prisoners because of the extreme danger they would face if they attempted to leave. Few have any prospect of rebuilding more or less normal lives until the conflict is over.

RECOMMENDATIONS

The grave inadequacy of care provided is due, in part, to the concept held by both the Salvadoran and U.S. governments that the problem of the displaced is strictly short-term. The evidence suggests, however, that this is not the case: the civil war and the massive dislocation of persons it has engendered started four years ago and has continued unabated. Most informed observers believe that the conflict will not end in the near future. At the outset, then, the misconception about the short-term nature of the problem must be rectified.

There are compelling humanitarian and social reasons for providing adequate protection and care to the displaced. Most displaced are women, children and elderly people, victims of forces beyond their control, who live in subhuman conditions. The existence of this ill-nourished, diseased and largely illiterate displaced population which constitutes about 10 percent of all Salvadorans, has created tremendous strains on Salvadoran society. It poses the danger of a permanent class of dispossessed, with all the potential for future destabilization which that implies.

The U.S. can be instrumental in securing legal protection for the displaced. In particular, assistance for the displaced should be distributed exclusively through a private neutral organization or grouping. Direct or indirect aid intended for the displaced but administered by the government of El Salvador should be terminated.

Greater attention also should be given to the protection problems of the displaced within the U.S. Embassy and AID Mission in San Salvador. Unless adequate staff attention can be given to this problem, the U.S. government is not going to be able to develop innovative, effective solutions to the protection dilemma and the other numerous problems of the displaced.

One relief worker put it to us quite simply: innocent displaced people, including those who have relatives with the guerrillas, are afraid that they will be killed by the military, so neutral assistance organizations are needed. This relief worker said that his group was not willing to receive assistance from or be coordinated by CONADES because it did not want to be perceived as being part of the Salvadoran government, any more than it wished to be perceived as aligned with the guerrillas. Despite his groups' attempts to maintain strict neutrality, however, its members have been subjected to attacks, including torture, detention and other harassment. They declined to speak with us unless we promised not to use their names.

Continued U.S. aid for the displaced through the Salvadoran government not only fails to respond to the severity of the situation, but also condones and reinforces the political bias with which aid is being distributed to some displaced but not to others. This pattern of assistance does not promote the proclaimed humanitarian aims of United States aid programs.[6]

The continuation of current U.S. policy insures the exclusion of thousands of needy women, children and elderly people — those against whom no crimes have been charged or proven — who are regarded as "subversives". In effect, these innocent victims of the war have been convicted without trial of guilt by association, and as a result are suffering the punishment of confinement in camps offering subhuman living conditions.

For institutional reasons having to do with their own need to maintain a neutral position in El Salvador and in the international community, many private organizations will not affiliate themselves with either side in this civil war, and thus will not accept U.S. funds. The United States should respect their neutrality; indeed, it should pose no problem if humanitarian assistance is to be the sole purpose of U.S. aid to the displaced. When the conflict is over, regardless of who wins, such neutral organizations may be in an excellent position to aid displaced persons and refugees in returning and resettling.

The United States should also tell the government of El Salvador that military attacks against civilian non-combatants in conflicted areas must be stopped immediately, because this practice violates the Geneva Conventions and causes further displacement.[7] Future U.S. aid to El Salvador should

[6] A Congressional study recognizes that solutions for the refugee and displaced persons problems are "crucial elements to the success" of the larger efforts for a negotiated peaceful settlement and the establishment of a democratic government. "Refugee Problems in Central America", *Committee on the Judiciary, United States Senate*. Staff report to the Subcommittee on Immigration and Refugee Policy, Sept., 1983.

[7] *See, e.g.*, "Geneva Convention": *The Amelioration of the Wounded and Sick in Armed Forces*

be conditioned on an end to military attacks on civilian non-combatants, including the displaced.

The basic human rights of the displaced located in government-controlled zones are violated by military incursions into the camps and detentions and disappearances of relief workers and displaced people. These violations of human rights should be condemned by the United States. Future U.S. aid to El Salvador should be conditioned on an end to human rights abuses against the displaced and relief workers.

Also, to force the displaced to return to an insecure area, especially through the threat of food cutoffs, is inhumane and illegal; it is the placement of war victims for military strategic purposes. No futher U.S. aid should be expended in this ill-conceived forced resettlement effort. The availability of U.S. support should be conditioned on termination of all such programs.

Finally, continued insistence on registration of displaced persons guarantees that displaced persons who fear the government will not receive government aid. While private voluntary agencies should be required to maintain internal accounting, there is no need for the government of EL Salvador (or the United States) to have access to the names of the displaced or other such sensitive information. Aid should be distributed to need and not political bias.

CONCLUSION

The plight of displaced persons in El Salvador is grave, and, indeed, a case study in the inadequacies of refugee protection in the context of a civil war. The displaced in El Salvador are extraordinarily vulnerable and most have no realistic recourse to legal protection. Most are women and small children. Yet they are attacked by the Salvadoran military, afraid to register for aid and used as pawns for military strategic purposes. Absent the implementation of the recommendations outlined above, the situation can only worsen.

The situation of the Salvadoran displaced, however, is but part of a larger worldwide problem involving millions of people in refugee-like situations who have no prospects for legal protection or humanitarian assistance. The numbers of such persons continue to grow and the international legal regimes and relief agency infrastructures become increasingly inapplicable. And the crisis continues to deepen.

---

in the Field — First Convention; *U.N.T.S.*, Vol. 75, page 31; *The Amelioration of the Condition ofWounded, Sick and Shipwrecked Members of Armed Forces at Sea* — Second Convention; *U.N.T.S.*, Vol. 75, page 85; *Relative to the Treatment of Prisoners of War* — Third Convention; *U.N.T.S.*, Vol. 75, page 135; *Relative to the Protection of Civilian Persons in Time of War* — Fourth Convention; *U.N.T.S.*, Vol. 75, page 287.

13

Church Sanctuary: Historical Roots and Contemporary Practice

Dr. Richard H. Feen*

> *"The struggle for justice has reached a new stage. Now the pastoral has merged with the political, service is prophetic, and love is a subversive activity".*
>
> Reverend Sid Mohn, United Church of Christ

> *"If we allowed clergymen to take seriously the notion of a secular asylum...it seems to me that we would have degraded the concept of asylum thoroughly and we will have introduced 'Mickey Mouse' into theology".*
>
> President John Silber, Boston University

The use of churches as places of refuge for illegal aliens from war-torn Central America is rapidly gaining acceptance by the clergy and the lay community. In particular, sanctuary is being invoked as a means of civil disobedience to protest the government's practice of deporting undocumented Salvadorans back to their country. The harboring of illegal aliens under the name of sanctuary is thus being offered by the churches as a symbol of resistance to United States support for the governments of El Salvador and Guatemala.

Theologians and others have been quick to point out that the current practice of offering sanctuary to fugitives is but a continuation of a Judaeo-Christian tradition. In part, their justification is based upon the claim that they are simply observing a custom which can be traced back to the Old Testament and medieval canon law. In their eyes, "sanctuary" has always been of deep "religious-political significance". As one minister explained, since the earliest times, "God's law could be invoked...in opposition to civil law".[1]

* Special Assistant, Office of Ambassador H. Eugene Douglas, U.S. Coordinator for Refugee Affairs.

[1] Sid L. Mohn, "Central American Refugees: The Search for Appropriate Responses", *World Refugee Survey 1983* (New York: American Council for Nationalities Service), p. 45.

Within this context, it is important to determine what has been the historical usage of sanctuary by the church? Was it ever envisioned to be used as a challenge to civil authority? Could any fugitive from justice place himself under ecclesiastical care? Only by examining both the form and substance of this ancient tradition can we judge whether these modern advocates of sanctuary are truly following the practice as developed in the canonical codes of the church.

The legal basis for church sanctuary can be found in the Old Testament with the establishment of the Levitical cities of refuge for those guilty of involuntary homicides.[2] The intention of this law was to rule out blood vengeance and any other similar forms of self-help to obtain redress in this matter. I order that the cycle of retaliation be stopped and tribal unity held, the duty of vengeance by the murdered person's relatives was to be turned over exclusively to the highest authority — God. Thus the priests, God's official designees became the arbitrators and protectors of those fleeing vengeance. This occurred not only in the ancient Near East but in the Greco-Roman world as well.

By the late medieval ages, with the growth of state power and the king's authority, royal edicts were conceived to restrain this "license" of revenge and to limit the duration of feuds. Yet, custom dictated that the clergy have a special role as intermediaries between criminals and those who desired vengeance. Thus, the church in time, became a recognized place of refugee for those involved in any number of crimes.

As one can imagine, the whole matter of "sanctuary" became involved in the perpetual struggle between church and state. However, agreement was reached between the secular and ecclesiastic authorities on this issue. Though the law of sanctuary varied from country to country as a result of local custom, the Christian kingdoms were indeed governed by a set of common sanctuary principles.

Overall, one could seek sanctuary in any religious center, be it a church, monastery or abbey. In fact, a number of such places were specially chartered by the crown for that purpose. However, not every type of criminal was permitted to go into sanctuary or, if they got in, allowed to remain. Those excluded from the privilege were repeat offenders, heretics, sorcerers, those already convicted of an offense and suspected or indicted traitors. On this latter point, it is interesting to note that kings often commanded that their political enemies who fled to sanctuary be removed.

According to canon law (especially as formulated in England), those who arrived safely within the precincts of a sanctuary were expected to make a confession of their misdeeds to the ecclesiastical officials, surrender any

[2] *See*, Moshe Greenberg, "The Biblical Conception of Asylum", *Journal of Biblical Literature*, Vol. 78, 1959, pp. 125 ff.

weapons and put themselves under the supervision of the religious head.[3] Depending upon the place of sanctuary, fugitives might be required to wear religious garb and take part in daily activities such as the ringing of the bells and the attendance of Mass.

Contrary to contemporary beliefs surrounding the practice of sanctuary, the fugitive was not given an indefinite period of time to remain on church grounds. Moreover, his/her future options were specifically circumscribed. Within a period of forty days, the individual was given the choice of either taking an oath to "foreswear the realm" (*i.e.*, go into permanent exile) or surrender to the king's authorities and stand trial. On the continent of Europe, as opposed to England, there existed the possibility (though rare) of remaining and joining a religious order for the duration of one's life.

In England, if one decided on exile and took the formal oath, he/she was first to be branded on the thumb with the letter "A". Then, he/she was given a set number of days to make his/her way on the king's highway to the border or port of departure. He/she was to travel barefooted, bareheaded and wearing a white sackcloth on which a red cross would be painted. Townsfolk would accompany him/her in order to guarantee his/her safety from vengeance seekers. As one would expect, all lands and goods would be forfeited.

In regard to those who sought to turn themselves in to the civil authorities, the forty days offered the fugitive time to contemplate his/her offense and prepare his/her case. Furthermore, the formal transfer from ecclesiastical to lay officials would take place under guard, thus keeping the defendant safe from any retribution by avenging parties.

With the Reformation in the 16th century came a critical questioning of the practice of sancturary.[4] The early leaders of the Reformation held the concept to be invalid as the physical presence of the church as well as the clergy within, were thought to have no exclusive hold on holiness. Furthermore, they were quick to side with the Protestant princes in their fight to obtain supreme authority over their domains. The French king and other Catholic monarchs soon followed suit to abolish sanctuary. They held that if confidence in public order was to survive, violent criminals could not be allowed to escape civil justice.

In order to accommodate these needs, in 1591, Pope Gregory XIV issued a Papal bull which restructured the process of granting sanctuary. Henceforth, when a bishop received an application, the individual was to be taken out of

[3] *See*, John Bellamy, *Crime and Public Order in England in the Late Middle Ages* (London: Routledge & Kegan, 1973); John Cox, *The Sanctuaries and Sanctuary Seekers of Medieval England* (London: G. Allen & Sons, 1911); Georgius Rittershusius, *De Jure Asylorum*, 1623.

[4] *See*, Owen Chadwick, *The Popes and the European Revolution*, (Oxford: Clarendon Press, 1981).

sanctuary and placed into the Episcopal prison until he could be tried by the ecclesiastical authorities for his crime. If the evidence gave reasonable grounds for a guilty verdict, the accused was to be immediately handed over to the civil authorities for trial in the state's court.

As an indication of their good will toward the temporal powers, as well as to avoid further conflict over an issue they were sure to lose, the Popes later removed the right of sanctuary for anyone whose acts had resulted in a death, regardless of circumstances. By the late 17th century, the only ones seeking sanctuary were debtors. A period of two months, therefore, was established for the individual "to make grace", at which point the debtor would be expelled from sanctuary and thrown to the mercy of his creditors.

Though sanctuary remained in the canonical code books of the church, it was very rarely practiced from the 18th century onward. The use of churches as places of refuge for civilians fleeing the horrors of war did continue in the modern era, but the laws of warfare did not designate churches as places of safe haven for the noncombatant population. Unfortunately, no international conventions recognized churches as a refuge for the innocent.

It should be noted that in America, given the early separation of church and state, a law of sanctuary never existed. There was a brief attempt by isolated Protestant churches in the North to establish the "right of sanctuary" for escaped slaves from the South, but it was never officially recognized. Persons could seek refuge in a church, but the clergy had no formal power to refuse the entrance of public law officers to arrest runaway slaves. During the Vietnam War, draft resisters sought the protection of the church but that too failed, as there was no legal precedent for sanctuary.

Given this brief review of the historical usage of sanctuary by the church, we can see that the contemporary practice of sanctuary does not have firm roots in ecclesiastical tradition. Sanctuary was never meant to challenge openly and defiantly the civil authorities. In addition, those seeking sanctuary were not encouraged by the clergy or their congregations. Furthermore, once inside church grounds, it was expected that the fugitive would resolve his/her uncertain status by either turning himself/herself in to the king's officials to stand trial for supposed crimes or by permanently leaving the country altogether. Finally, sanctuary, as a place of refuge where a person could remain with a certain immunity from the state, was a foreign practice and was never accepted in the United States.

It should come as no surprise then, that the Catholic Church — having the longest tradition of sanctuary — does not find the concept valid today. In the revised canonical code there is no mention of sanctuary. As one canon law scholar commented on its disappearance, "sanctuary no longer has a place in contemporary church practice". As far as the Archbishop of Washington, D.C. is concerned, for Catholics, sanctuary will remain as that

part of the Church that used to be separated from the congregation by the communion rail.[5]

As a rule, church authorities throughout history have never relished their confrontations with temporal powers over the harboring of illegal persons. This situation seems to exist at present as a majority of the Catholic bishops are still not in favor of initiating sanctuaries in their dioceses for illegal aliens hiding from the immigration service. Many are of the opinion that civil disobedience can be employed only when every other remedy has been exhausted; clearly, wrote the editor of the *Catholic Standard*, "this is not the case here".[6] Lawyers are indeed available and the courts are open for those Salvadorans who wish to apply for legal residency on the grounds that they are fleeing political persecution from their country rather than harsh economic conditions. U.S. refugee law specifically states that those illegal aliens who can prove they would be persecuted if they returned home will not be deported but given asylum. "I do not feel at the present time", said Auxiliary Bishop Bevilacqua of Brooklyn and chairman of the Catholic Bishop's Committee on Migration, "that this is an unjust law".[7]

As most people are no doubt aware, *de facto* sanctuary already exists in this country for most illegal aliens. Over half a million Salvadorans are now illegally in the United States., If the 1983 rates of deportation are any indication, a majority of those here can expect to stay indefinitely. The limited resources devoted to immigration enforcement rule out any widespread apprehension and detention in the near future. In addition, the INS, while willing to arrest undocumented aliens almost anywhere, has yet to drag anybody out of a church. Government agents have indeed respected churches, parishioners, clinics and classes run by the clergy, thereby allowing Salvadorans to gather with a sense of security in these places. By publicly humiliating the INS, sanctuary advocates may jeopardize the very Salvadorans whom they wish to assist.

Unfortunately, the motivations of some of those pushing church sanctuary in their congregations are not entirely humanitarian. These activists do not simply want to help illegal Salvadorans in this country, they want to use them in a campaign against U.S. support for the government of El Salvador. As reported in *Christianity and Crisis*, "one of the primary objectives" of the sanctuary movement, is "to offer living testimony about the war's effects". Saturation of political analysis does not deeply educate the North American

[5] *Memorandum on Sanctuary*, March 15, 1983, Office of the Archbishop, Archdiocese of Washington, D.C.

[6] "Sanctuary: For the Birds", Editorial, *Catholic Standard*, March 24, 1983.

[7] U.S. Churches Offer Sanctuary to Aliens Facing Deportation", *New York Times*, April 8, 1983, p. A-38.

base church about the effects of State Department policy in Central America".[8] The Reverend John Fife, one of the leading church spokesman for sanctuary, stressed the importance of this political purpose, "lest religious groups think of the sanctuary project as church sponsored resettlement programs".[9] And in the Church World Service resource booklet, *Seeking Safe Haven* (a "how to" book in regard to establishing church sanctuary), the authors emphasize that these fugitive Salvadorans are to be used as "a symbol of resistance" like Vietnam war draft resisters, to dramatize the "immortality of U.S. intervention".[10]

The literature produced, as well as the statements made by many of the churches and sanctuary activists, leaves one with the impression that the overall goal of the sanctuary movement is not so much to protect illegal aliens in distress, as it is to "raise the consciousness of the nation".[11] Under such circumstances, the theological justifications given for church sanctuary seem only to be a window dressing for political motives.

Another disturbing factor associated with the sanctuary movement is that it actually endangers the American refugee program. Sanctuary advocates make a point of classifying most Salvadorans who make their way northward as "political refugees". Yet, as even the liberal *Washington Post* recently pointed out in one of its editorials, most are fleeing not violence or political persecution in El Salvador, "but economic hardship in Mexico, their port of first asylum".[12] By confusing the specific distinction between economic migrants and refugees, the entire concept of political asylum that we have so carefully constructed in the Refugee Act of 1980, will be progressively eroded and finally destroyed. As the U.S. Coordinator for Refugee Affairs has often stated, "If everyone is a refugee, then no one is a refugee". There can be no doubt that those who mislabel migrants as refugees cloud the crucial legal and moral difference that protects refugees and our ability to offer them an

[8] Reny Golden and Michael McConnell, "Sanctuary: Choosing Sides", *Christianity and Crisis*, February 21, 1983, p. 35.

[9] *Ibid.*

[10] *Seeking Safe Haven* (New York: Church World Service, 1983), pp. 66-67. This is actually a congregational guide produced with the American Friends Service Committee and the Lutheran Immigration and Refugee Service.

[11] *See*, the material produced by the Chicago Religious Task Force on Central America. It should be noted that their publication, "Basta: Sanctuary Organizer's Nuts and Bolts Supplement", contains misleading statements. Just recently, Amnesty International had formally taken this group to task for falsely attributing to them incorrect data regarding Salvadoran Deportees, in particular, that 30 percent of those Salvadorans returned "are tortured,maimed or murdered upon their return.

[12] "Deporting Salvadorans", Editorial, *The Washington Post*, April 2, 1983.

immediate, safe haven.[13] The urgency of a person targeted for political oppression cannot be compared to one seeking better economic opportunities.

It should be noted that a majority of Salvadorans in the United States are would-be immigrants who want to live here. In fact, ten years ago, well before the Salvadoran insurgency began, a quarter of a million to half a million Salvadorans were estimated to be in this country illegally. Their presence reflects a longstanding pattern of economic migration to the United States stemming from the reality that El Salvador, besides being poor, is the most densely populated country in the Western Hemisphere. Church sanctuary, therefore, only encourages further illegal immigration from El Salvador. If this trend continues, the nation may be forced to change its benign enforcement policies and its tradition of generosity.

In regard to those Salvadorans who have not been singled out for persecution but who nevertheless have been displaced by the fighting, there are numerous opportunities for temporary asylum in neighboring Central American countries. The question that needs to be asked is: why should these people be singled out for resettlement in the United States, when this preference is not made available to the rest of the millions of displaced persons around the globe? In terms of the resettlement option, we must distinguish between those persons fleeing persecution because of race, religion, nationality or political opinion who can never return to their country of origin and, those uprooted individuals of first asylum who are likely to be able to pick up the pieces of their lives back home once the fighting is over.

It is truly unfortunate that many sanctuary activists, in order to win sympathy for their cause, tend to downplay the U.S. Government's support for refugee care. At present, the United States is still, by far, the most generous country in the world when it comes to refugee assistance.[14] We have accepted more refugees for permanent resettlement than all the other Western countries combined. Close to three-quarters of a million Southeast Asian refugees alone have been given a safe haven here. (Of course, this does not include the nearly 500,000 legal immigrants accepted on a worldwide basis each year.) Furthermore, the United States provides more assistance than any other country to the United Nations High Commissioner for Refugees (UNHCR), the Red Cross and other related international agencies and organizations concerned with refugees and displaced persons. In 1983, U.S. contri-

[13] *See*, H. Eugene Douglas, "Sanctuary Advocates are Wrong", Editorial, *USA Today*, April 20, 1984; Elliott Abrams, "Diluting Compassion", Editorial, *New York Times*, August 5, 1983.

[14] On U.S. support for refugees *see*, *Report to Congress: Proposed Refugee Admissions and Allocations for Fiscal Year 1983* (Washington D.C.: Office of the U.S. Coordinator for Refugee Affairs, State Department).

butions to the UNHCR and the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) accounted for 30 percent of their respective budgets.

In particular, the U.S. Government actively assists, through funding and other means, church-related refugee assistance programs, be they in the feeding and housing of refugees in countries of first asylum (*e.g.*, Honduras, Pakistan, Somalia, Thailand) or in resettlement programs here. According to recent figures, voluntary agencies received $31 million for their domestic programs and some $29 million for their work overseas. Thus, contrary to claims made, the U.S. Government and the present Administration does indeed support various churches and private organizations in their efforts to assist uprooted and displaced persons fleeing the violence of their homeland — regardless of region or race.

In conclusion, the success of the sanctuary movement will ultimately be determined by the congregations and not the activists within their ranks or the clergy. More specifically, it will depend upon what moral obligations sway the American public.[15] Generally speaking, Americans vacillate between "minimal altruism" (which entails that one help others when it can be done so without great cost) and "heroism" (which calls for major personal sacrifice) when it comes to questions of helping the less fortunate in the world. While the Judaeo-Christian ethic does obligate us to assist the less fortunate, our Social Darwinist tradition prevents compulsion toward heroic behavior. Thus, no national consensus exists which would accept the curtailment of individual welfare in order to allow millions of poor and oppressed persons a homeland in the United States. Given that a majority of American citizens advocate both increased immigration law enforcement (*i.e.*, deportation of illegals) and a reduction in legal immigration flows, it seems unlikely that Good Samaritanism or notions of communal guilt will have significant strength to sway middle-class America toward the sanctuary movement.

Sanctuary, to most Americans, will remain an aviary that is off limits to hunters.

[15] For more on this topic see, the author's, "Our Brother's Keeper? Theories of Obligation in U.S. Refugee Policy", *World Refugee Survey*, 1983.

14

Sanctuary: An Impasse

David Brooks Arnold *

COMPONENTS OF THE MOVEMENT: PROTECTION AND PROTEST

Readers have known of sanctuary for some time: of its origins as a movement in the Southside Presbyterian Church of Tucson, Arizona in March 1982 and, of its spread since then to nearly one hundred congregations of varying denominations throughout this country.

Sanctuary as it has evolved during these past two years comprises two components: primarily the shielding of Salvadorans with non-legal entry status (though of some Guatemalans and Hondurans as well) in this country from presumed deportation by the Immigration and Naturalization Service; and, by this shielding — in the form of harboring in churches, securing homes and employment, or conveyance to other parts of the country thought to be more safe or to Canada — the protesting of current refugee policies of our government considered by adherents of sanctuary to be illegal, as well as foreign policies considered to be immoral.

The numbers of those harbored, transported, or otherwise aided are comparatively few in relation to the more than 500,000 Salvadorans thought to be in this country with non-legal entry status, and although there have been concerted attempts within this movement to research and revive a biblical practice of church sanctuary for those fleeing possible actions of the state, the actual period passed in the sanctuary of a church by any of those shielded has been so abbreviated as to be clearly symbolic. Many have recognized, including adherents of sanctuary themselves, that the core component of this movement would appear to be protest.

CAUSES OF THE PROTEST

One of the declared causes of this protest, and for some adherents of the movement the primary one, has been an aspect of the refugee policies of the current administration deemed to be contrary to international law, specifically, the United Nations Protocol Relating to the Status of Refugees, to which the U.S. Senate acceded in November 1968 and which defines both the status and

* Center for the Study of Human Rights, Columbia University.

rights of refugees and the obligations of Protocol signatories to respect these rights.

Article 33 of this Protocol states that a person determined to have a well-founded fear of persecution in his country of nationality is not to be returned unwillingly to that country. Adherents of sanctuary accept as more than premise — indeed they call it established fact — along with those of legal background citing the maxim *"res ipsa loquitor"* or a state of affairs that speaks for itself, that all Salvadorans who have fled their country since early 1980 would face a well-rounded fear of persecution if they were to return home under current conditions.

These adherents point to a study mission by staff of the Office of the United Nations High Commissioner for Refugees in 1981 that concluded "UNHCR should continue to express its concern to the U.S. government that its apparent failure to grant asylum to any significant number of Salvadorans, coupled with large scale forcible and voluntary return to El Salvador, would appear to represent a negation of its responsibilities assumed upon its adherence to the (United Nations) Protocol (Relating to the Status of Refugees)"[1] as evidence for their position.

A second cause of this protest, and for other proponents of sanctuary the primary one, is the current foreign policy of this administration towards Central America in general, and El Salvador in particular. These individuals foreswear all U.S. military intervention in this region, maintaining that it is such intervention itself that is the core cause of the mass flight of individuals deemed refugees; these proponents attach themselves to sanctuary as a tool towards this intent.

EFFECT OF THE PROTEST

If the object of the protection component of sanctuary has been the demonstration of compassion for fellow human beings in need, there can be no question that adherents of this movement have shown compassion in abundance. If, however, the object of the protection component of this movement has been, in the words of sanctuary adherents themselves, the altering of the American public to an illegality and an immorality perceived by the church community and, through the galvanization of this public, the pressuring of the current administration to change its policies, the effect of this aspect of sanctuary has been nil.

In the early months of sanctuary, as adherent communities appeared throughout the country, local awareness of the movement, as perceived through and conveyed by media coverage, was high. National awareness, however, never developed, and local attention has not remained even at its

[1] As appearing in the *Congressional Record*, February 11, 1982.

early level, or increased. The American public has not been galvanized, and the current administration shows no signs of having been pressured.

Indeed, this administration has, in return, countered the protest potential of sanctuary on two levels. First, government representatives have privately refuted the claims of illegality by sanctuary adherents, stating that they do not consider themselves in violation of international law in their treatment of Salvadorans seeking either refugee status or a safe haven in this country. They have pointed out that neither Salvadorans nor other peoples may, under the United Nations Protocol Relating to the Status of Refugees, be classified as refugees unless and until they "individually establish that their fear of being persecuted is a well-founded one..." and that "...the responsibility of establishing a well-founded fear of persecution rests with each applicant".

Further, they indicate "no asylum seeker is sent back until a determination has been made that the claimant has not established a well-founded fear of persecution".[2] They have stated that the preponderance of Salvadorans currently reaching this country are not, in their view, refugees but economic migrants seeking employment and a higher standard of living. They would have us understand that, even within the framework of the United Nations Protocol, it remains the prerogative of sovereign states to make their own determinations of refugee status and, once such status has been determined, to select for entry within their borders only those they may choose. They have reminded us in this latter regard that Article 14 of the Universal Declaration of Human Rights states only that "everyone has the right to seek and to enjoy in other countries asylum from persecution". The Declaration, they point out, does not grant the right of the individual to receive asylum wherever he or she may choose. Reception remains the decision of the sovereign state. Further, they have indicated that the UNHCR study mission cited by sanctuary adherents as evidence of illegality produced but an internal memorandum, not an official document or protest transmitted to any government, let alone this one.

They have refuted the claims of foreign policy immoralities by stating that their goals in Central America are to alleviate those conditions causing human misery and human rights violations and, thereby, to avert the very mass flight which sanctuary adherents claim has already started. Indeed, they believe that, in the absence of these policies, human rights abuses would become so widespread that there would be a flood of what would then be *bona fide* refugees into this country that could, in the words of former Secretary of State Haig, "make the Cuban influx look like child's play".[3]

The administration has publicly ignored the movement, refraining from

[2] Letter to U.S. Senator David Durenberger from Powell A. Moore, Assistant Secretary of State for Legislative and Intergovernmental Affairs, June 6, 1983.

[3] *New York Times*, February 23, 1982, page A1.

taking any steps that might offer sanctuary public exposure. Although movement adherents know and acknowledge that the harboring of undocumented aliens can constitute a federal criminal offense and have consequently prepared themselves and their church sanctuaries against possible INS raids, there have been no such raids and, in all likelihood, will not be any. This administration knows full well the publicity such actions would engender and the opportunities that ensuing court cases would give to the movement to contest government actions. Whatever else may be said about the refugee policies and procedures of this administration, it has, in this instance, demonstrated restraint.

Several people looking at sanctuary vividly recalled the beginnings of the Vietnam protest twenty years ago and noted striking resemblances. Both movements started in the church community, both were based on conclusions that certain actions of the U.S. government were illegal and immoral and both attempted to utilize their protest as a vehicle to transform policies. But, whereas the Vietnam protest movement very quickly reached the attention of the American people and its then administration, sanctuary hardly has been noticed by our public, and has been ignored by our government.

As I make this comparison, I cannot attempt to offer observations or conclusions on the eventual development of the Vietnam protest movement or on whether it may or may not have had any effect on the dramatic transformations of U.S. foreign policy and military policies towards that country in the early 1970s. I do recall, however, that a study of the effect of that movement on Vietnam policy conducted in 1966,[4] when the movement was but two years old (the same age as noted for sanctuary) concluded that, although there had been no discernible effect of the Vietnam protest on the content of policy, there had been marked effects on the rhetoric of that policy, with then President Johnson, Secretary of State Rusk, and other administration officials appropriating key phrases and slogans of the movement, as though these phases and slogans reflected their goals as well.

Such a point had been reached because the Vietnam protest movement had caught the attention of the American public, through national newscasts, publications having wide dissemination to a broad spectrum of the American public, and through the conferences and journals of the private foreign policy research community. Sanctuary has not proven a match. The word has remained primarily within the church community, those articles that have appeared have been written by and directed principally towards that community and the wider society remains ignorant. Attempts to reach beyond have thus far proven unsuccessful.

Those who have established sanctuary believe that their movement was

[4] David Arnold Brooks, *The Protest Movement and Vietnam Policy*, Center for International Studies, Ohio University, Athens, Ohio, May 1966.

built upon ideals utilized in the founding of this nation. They had hoped that it would evolve in such a way as to heighten the social consciousness and the perceived moral obligation of this country to be a continuing safe haven for the oppressed and abused populations of the world. They had anticipated that the movement would lead to a constructive dialogue between those of concern and those of responsibility in the field of refugee affairs.

It has not. Sanctuary, as protest, has reached an impasse.

15

Admission of Refugees under the Revised Immigration and Nationality Act

Diana L. Zanetti *

On March 17, 1980 the 96th Congress passed the Refugee Act of 1980. The Act's objective is to provide a permanent and systematic procedure for the admission to this country of refugees of special humanitarian concern to the United States, and to provide comprehensive and uniform provisions for the effective resettlement and absorption of those refugees who are admitted.

The Refugee Act of 1980 defined the term "refugee" in the Immigration and Nationality Act as "A) any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion, or B) in such special circumstances as the President, after appropriate consultation (as defined in section 207 (e) of this Act) may specify, any person who is within the country of such person's nationality or, in the case of a person having no nationality, within the country in which such person is habitually residing, and who is persecuted or who has a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group or political opinion. The term 'refugee' does not include any person who ordered, incited, assisted or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular social group or political opinion."

The new definition of "refugee" (*i.e.*, persons of a particular origin not enjoying the protection of their country) replaced the earlier method of defining refugees by categories, by the general concept of "fear" for a relevant motive. Fear, a subjective element, is explored in the person applying for recognition as a refugee. Determination of refugee status will, therefore, primarily require an evaluation of the applicant's statements rather than a judgment on the situation prevailing in his or her country of origin.

* Assistant Commissioner, Asylum and Parole, INS

The Immigration and Naturalization Service (INS) has instituted a series of program improvements in its refugee processing and overseas operations. A significant development has been the recent issuance of revised *Worldwide Guidelines for Overseas Refugee Processing.* The guidelines resulted from a National Security Council Directive (NSCD #93) signed by the President regarding policy and processing of Indochinese refugees. The Directive calls upon the Attorney General to determine "whether there are categories of persons who, under the Refugee Act of 1980, share common characteristics that identify them as targets of persecution" by the governments of Vietnam, Laos and Kampuchea. The Attorney General subsequently found that such categories of persons do exist and that individual case processing would be improved by issuing revised guidance for INS field use.

The revised guidelines that INS has issued is a comprehensive statement of processing policies and procedures for worldwide use. It reflects experience to date in implementing the Act and careful analysis of case decisions and refugee claims. For Indochinese processing, the guidelines describe categories of refugees that have been determined to be likely targets of persecution. If the facts of a case place the applicant in a category and, if the applicant demonstrates a fear of persecution, the INS officer may approve the applicant. Where an Indochinese applicant does not fall within a category, the officer will decide the case based on his/her evaluation of whether persecution has occurred or whether a well-founded fear of persecution exists.

The guidelines became effective in August 1983, but their major impact is being felt in FY 1984 processing.

The particular interests of the United States in affording resettlement opportunities in specific refugee situations have been defined, as a result of consultations with the Congress, by spelling out eligibility criteria for United States refugee admissions. Applicants for refugee admission into the United States must meet all the following criteria:

- The applicant must meet the definition of a refugee as described in the Refugee Act of 1980;
- The applicant must be among the types of refugees determined during the consultation process to be of special humanitarian concern to the United States;
- The applicant must be admissible under United States law;
- The applicant must not be firmly resettled in any foreign country (in some situations, the availability of resettlement elsewhere may also preclude the processing of the applicants).

Although a refugee may meet the above criteria, the existence of the United States refugee admission program does not, of course, create any entitlement for that person to enter the United States. The admissions program is a legal mechanism for admitting a refugee when it is judged that the applicant is

among those persons for whom the United States has a special concern; is eligible under one of those priorities applicable to his/her situation, and meets the definition of a refugee under the Act, as determined by the Immigration and Naturalization Service. The need for resettlement, not the desire of a refugee to enter the United States, is the governing principle in the management of the United States refugee admissions program.

Every year the President proposes a ceiling for admissions of refugees. For the past four years, the President and the U.S. Congress have proposed and approved:

FY	Allocation	Approved	
1984	72,000	41,285	(Oct-March 1984)
1983	90,000	73,651	
1982	140,000	61,534	
1981	217,000	158,531	

Section 208(a) of the Refugee Act was enacted to provide that the Attorney General establish a procedure for an alien physically present in the United States or at a land border port of entry, irrespective of such alien's status, to apply for asylum. The alien may be granted asylum at the discretion of the Attorney General if it is determined that such alien is a refugee within the meaning of section 101(a)(42).

If an applicant files a non-frivolous asylum application, he/she may be granted authorization to accept employment in the United States. An advisory opinion is requested from the Department of State's Bureau of Human Rights and Humanitarian Affairs in every asylum request filed. The burden is on the applicant to establish that he/she is a "refugee", as defined in section 101(a)(42) of the Act.

The Attorney General has discretionary authority to grant or deny an asylum application. In addition to discretionary grounds, an alien shall be denied asylum if:

a) he/she is not a "refugee" within the meaning of section 101(a)(42) of the Refugee Act; or

b) he/she is firmly resettled in a third country; or

c) he/she participated in the persecution of others; or

d) he/she was convicted of a particularly serious crime and, therefore, constitutes a danger to the community of the United States; or

e) there are serious reasons for considering that the alien has committed a serious non-political crime outside the United States prior to arrival; or

f) there are reasonable grounds for regarding the alien as a danger to the security of the United States.

An application for asylum may also be denied as a matter of discretion if there is an outstanding offer of resettlement by a third nation where the applicant will not be subject to persecution and the applicant's resettlement in a third nation is in the public interest.

Due to the influx of Cubans during the Mariel boat lift in 1981, the present asylum pending case backlog is 153,693. Out of this backlog a little over 115,000 are Cubans and some 5,000 are Haitians. Therefore, only 33,693 of all nationalities are pending.

The Commissioner has established CORAP's number one priority to be the elimination of the asylum backlog. For the first six months of FY 1984, 24,447 cases have been completed.

ASYLUM APPLICATIONS

FY	Received	Completed	
1984	13,415	24,724	(Oct-March 1984)
1983	26,091	25,447	
1982	33,296	11,326	

In addition, the office adjudicates parole requests exercising the Attorney General's parole authority provided by section 212(d)(5) of the INA.

The law contains two basic criteria for the use of parole, 1) "emergent reasons", and 2) "reasons deemed strictly in the public interest". These requests are handled entirely on an individual case by case basis. In 1983, 683 cases were approved and 888 were denied. For the first six months of fiscal year 1984, 313 cases have been approved and 294 cases have been denied.

The United States Coast Guard, in cooperation with the Immigration and Naturalization Service and the Departments of Justice and State, has been conducting a program in the area of the Windward Passage of interdicting Haitian vessels suspected of carrying illegal aliens to the United States. The Haitian Migrant Interdiction Operation (HMIO) initially commenced on October 10, 1981 as a three month trial effort. The immediate success of the interdiction program resulted in its continuation.

Over 11,500 excludable Haitians arrived illegally and were apprehended in South Florida during the twelve month period prior to the implementation of HMIO. During FY 1982, only 134 Haitians were known to have arrived illegally. Although these statistics are indicative of the program's success, they are only part of the impressive results of the operation. The United States Coast Guard presence has discouraged dangerous sea crossings in overcrowded and ill-equipped vessels. On several occasions the lives of many

Indochinese Refugees by Ethnic Group Camp Populations as of 2/29/84

General Refugees in all camps/countries in Southeast and East Asia:

Lao	20,908
Highlanders	48,501
Khmer	63,474
Vietnamese	50,308
TOTAL	183,191**

Country	Camp	Lao	Highland	Khmer	Vietnamese
Thailand	Ban Nam Yao	101	7,807		
	Ban Vinai	311	33,768		
	Chiang Kham	122	3,939		
	Kab Cherng			887	
	Khao I Dang			43,130	
	Nakhon Phanom	16,644	449		273
	Phanat Nikhom 1stAsy	676	1,061	4,133	563
	Phanat Nikhom KSL/Co	1,314	1,142	1,094	0
	Sikhiu				5,247
	Songkhla:*				
	Reception Center				146
	Transit Centers	630	42	4,177	2,373
	Ubon*				
	Reception Center	202	75		
	Vol Repat Center	258	111		
***					
	SUB-TOTAL	20,258	48,394	53,421	8,602
Malaysia	Pulau Bidong				5,849
	KL Transit Center/				
	Sungei Besi				3,778
	SUB-TOTAL				9,627
Singapore	Hawkins Camp				85
Indonesia	Tanjung Pinang				2
	Kuku				199
	Galang 1st Asylum				5,129
	Galang RPC			1,366	2,459
	SUB-TOTAL			1,366	7,789
Philippines	Palawan				1,761
	Bataan RPC	650	107	8,687	6,993
	SUB-TOTAL	650	107	8,687	8,754
Hong Kong	Open Camps				6,878
	Closed Camps				5,864
	SUB-TOTAL				12,742
Macau					796
Japan					1,790
Korea					25
Taiwan					98
	GRAND TOTAL	20,908	48,501	63,474	50,308

* The Ubon reception center has refugees awaiting movement to Nakhon Phanom, while the boat refugees in the Songkhla reception center are awaiting movement to Sikhiu. The Ubon voluntary repatriation center (Vol Repat Center) holds refugees awaiting voluntary repatriation to Laos.

** Does not include 287 Vietnamese (ODP) refugees in transit in Bangkok.

*** Note that the ethnic totals for camp populations in Thailand reported on this page and the ethnic breakdown for the refugee population in Thailand on page 2 do not track exactly (the source of both sets of figures is the UNHCR).

Haitians were saved by being rescued from floundering or disabled vessels. In addition, while conducting the interdiction patrol, the Coast Guard has been successful in the interdiction of drugs. A recent seizure involved over 80 tons of marijuana on a cargo ship.

Through March 26, 1984, 378 vessels have been boarded. Fifty of those were interdicted. Of the 1,237 Haitians interdicted, 1,201 or 97 percent were returned to their homeland. Seven Jamaican and five Indian nationals were also returned to their respective countries. One hundred ten other undocumented aliens of various nationalities were interdicted; however, due to the impracticality of returning them to their home countries, they were brought to Miami for exclusion/deportation proceedings. In FY 1983, there was a 500 percent increase over FY 1982 in the number of aliens interdicted.

REFUGEE ALLOCATIONS AND APPROVALS
BY MONTH AND AREA OF CHARGEABILITY

A — FY 1984 ALLOCATION BY AREA OF CHARGEABILITY

Allocation	East Asia	N. East So. Asia	U.S.S.R. E. Europe	Lat. Amer. Caribbean	Africa	Total
	50,000	6,000	12,000	1,000	3,000	72,000

B — APPROVAL BY MONTH AND AREA OF CHARGEABILITY FY 1984

Month	East Asia	N. East So. Asia	U.S.S.R. E. Europe	Lat. Amer. Caribbean	Africa	Total
Oct.	4,990	186	610	75	11	5,872
Nov.	5,493	1,038	763	7	24	7,325
Dec.	5,231	282	1,115	33	117	6,778
Jan.	5,421	285	901	4	123	6,734
Feb.	5,361	645	748	0	130	6,884
Mar.						
Apr.						
May						
Jun.						
Jul.						
Aug.						
Sept.						
Total	26,496	2,436	4,137	119	405	33,593

Source: Form G-319.

16

The Politics of Salvadoran Refugees

LEONEL GOMEZ*

PROBABLY the greatest honor I have yet received is to have been named an official enemy of the state of El Salvador. That means that my name has appeared on a list published by the Salvadoran army in all of the papers in El Salvador.

I consider that quite an honor.

Before I begin, I want to give you a short description of El Salvador by a State Department official, which I think is one of the best descriptions ever put down on paper:

> About the first thing one observes when he goes to San Salvador, and this is the capitol of the country, is the number of expensive automobiles in the street. There appears to be nothing between these high-priced cars and the oxcart with its barefooted attendant. There is practically no middle class between the very rich and the very poor. From the people with whom I talked I learned that roughly 90 percent of the wealth of the country is held by about one half of one percent of the population. Thirty or forty families own nearly everything in the country. They live almost in regal splendor with many attendants, send their children to Europe or the United States to be educated, and spend money lavishly on themselves. The rest of the population has practically nothing. I imagine the situation in El Salvador today is very much like France was before its revolution, Russia before its revolution, and Mexico before its revolution. The situation is right for communism and the communists seem to have found that out. Some days ago I was in the post office in San Salvador. Over three thousand pounds of communist literature emanated from New York City which has been confiscated by the postal authorities during the previous month. The authorities seem to realize that the situation is dangerous and are quite alert in the fight against communistic influences. One thing in their favor is that the people never go hungry. The poor can always get fruit and vegetables for nothing

* Former Deputy Director of the Agrarian Reform Program in El Salvador, and now a Political Refugee in the United States.

> and they can steal firewood to do the cooking. Also, since they never had anything, they do not feel the want very acutely of things they have never had before. A socialistic or communistic revolution in El Salvador might be delayed for several years. Ten or even twenty. But when it comes, it will be a bloody one.

Does that sound familiar? Well, it should because this was written December 22, 1931. Now, the State Department in all its wisdom managed to overlook a couple of things in this piece of analysis. First, there was a revolt a couple of weeks after this description was written. El Salvador lost .07 percent of its population. It was not a matter of ten or twenty years, it was a matter of weeks. The second point is poverty and misery in El Salvador. Here are people who have nothing or next to nothing. They must even steal firewood to do their cooking. Do you know what it is to come from a past in which you have nothing? To pass on through the present in which you have nothing and go into the future where you will have nothing? What is nothing?

A priest friend of mine started a co-op chicken farm. The local authorities did not like what he was doing. So they tied him up to a bedspring and they put him inside the latrine. About two hundred people used to come and urinate on him every day. They left him there for about fifteen days, naked. Then they took him out of the hole, put him inside a room, mattress and all, and brought a friend of his, a pregnant woman, into the room. She was raped in front of him; every time she was raped they would take the semen out of her vagina and put it on his face. Then they beat him up and cracked his skull; he became half paralyzed. Finally, they dumped him in front of his house. All of this took about thirty days. His family came out and brought him inside of the house. His brother went out to get a doctor. He was shot thirteen times and left in front of the house. End of the story.

How about the people that have next to nothing? Well, what does this State Department official say? This official says the Salvadorans never had anything. They do not feel the acute want of things they never had. I suspect, however, that no one is going to watch his son or daughter, mother or father die of starvation and be amused.

Another point that this description reflects is the fear of communism. The authorities are quite alert. But the authorities are quite alert only to stop the communists that are going to take advantage of this. Take advantage of what? Do you think misery in El Salvador is an accident? Our workforce is maybe two and half million people. If you pay two and half million people $160 a year, $135 a year, $200 a year, do you think that's an accident? That's going to make the very few that own nearly everything quite a bit of money, because it doesn't matter what is produced. The cost of whatever is produced is going to yield a very high profit. If you sell things abroad you're going to be paid in dollars. That means you are going to end up being very wealthy in a very short period of time.

To keep our work force of 2.5 million people, the wealthy need a partner. This partner is the army; it is in the business called kickbacks. Senator Christopher Dodd of Connecticut not too long ago put it rather nicely when he said on February 5th of this year that in the last three years, the U.S. has given El Salvador a billion dollars. Try to ask the U.S. government, if it can account for what happened to this money. So, when Senator Christopher Dodd said, "Look, this money is going down the rathole" he was right. And the disease does not begin and end here.

Let me relate to you the story from a rather interesting document from the police department in Mt. Kisco, N.Y. The police department in Mt. Kisco can hardly be described as a KGB front. As a matter of fact, it's a very conservative little town. Something rather amazing happened there in 1976. This concerns a case where the army chief of staff of the Salvadoran army and trained by the U.S. was caught in Mt. Kisco, N.Y., trying to sell weapons to organized crime in this country. Do you believe that? I'm not reading this from Pravda. It's from the police record. He was captured and put in jail. The police record says that the total monetary value of the arms to be purchased in the following year was $30 million. Shocking. Do you know what else? In 1976, I was in New Hampshire lecturing and I was approached by the Manchester union leader and asked to talk with them about El Salvador. I said no; I'm going to talk to you about challenging your bloody paper. I said, look, you call Mt. Kisco, N.Y., in behalf of your paper and tell Detective Sergeant Sersenna to tell you about the story (cited earlier) and check out if its true. When Sergeant Sersenna was called he stated the following account. The man that we captured was the army chief of staff of the Salvadoran army in 1976. And he thought we were Mafia. We were police officers in disguise. When we told him we were Mafia, he said, look, we are very similar to you. And then he also said that he had high hopes of becoming the next president of El Salvador. He was captured, and he spent some time in jail. He was released around the beginning of 1980 and was shipped back to El Salvador when I was still in government.

My boss, Raul Fuviera and myself demanded that an investigation be done in El Salvador. Since we couldn't get one, I asked the Manchester union leader to ask the State Department if at any time they had done an investigation of this case or knew anything about it. The answer that the State Department gave is in print in the article that this Manchester union leader published. The State Department said that: we don't know anything about this, and anyway, it's historical; we don't have files that go back to 1976.

In 1980, Raul Fuviera and myself, denounced a case of corruption that amounted to $40 million. This event took place in El Salvador. We used the press; we used television; we used direct contact with the government we were working with; we started legal procedures against the colonel that was responsible for some of the loss of this money. Suddenly we had eight

assassination attempts on our hands. I don't know if it was because we were very lucky or because Salvadorans have such a weird sense of humor that we survived as long as we did, but at the end my boss wound up with six bullets in his head, and two North American advisors died with him. Of course, this case is still pending investigation, not just by the government of El Salvador but also by your own government. Hopefully, we will not have to wait another three years to see the results of this investigation, although we might have to wait another four years if Mr. Reagan is reelected.

One would probably assume that a person with my background could have come to this country and could have been granted political asylum quite easily. Yet, for more than a year and a half the State Department told me that they had lost my application. They said that they knew exactly where it was but that it was lost. Finally, I was granted political asylum. But every time I said something against U.S. policy, I was told in informal ways by junior officers at the State Department, that I was putting my legal status in this country in jeopardy.

This will give you an idea of the kind of blindness that exists, the kind of blindness that produces the sort of policies that will bring about hundreds of thousands of refugees. But what is worse, it also produces a side product — hate. I wouldn't worry so much about refugees, but I would worry about hate. Hate, blind hate, so close to your country for some of the reasons that I have mentioned, is a very dangerous combination for you and for us. When we talk about refugees, we are not just talking about helping one another. What we are really trying to do here is to avoid another Vietnam that is very close to you now. I don't think, as Mr. Reagan says, that the concern ought to be that a lot of refugees are going to come here. The concern, Mr. Reagan, is that you are going to wake up here and say, by God, we're becoming the Germany of the 1940s. I don't know when this will happen. Maybe by the year 2000.

What I have just related to you is similar to my experiences on the eastern front during the 1940s. I didn't know what the hell was going on. I never thought the Nazis were killing Jews. A distant relative of mine lost his family and I lost part of my family in Germany. They were Jewish. He decided to stay in Germany after the 1940s to try to find out what had happened; what his neighbors and friends had to say. He came to the conclusion that the only reason why the Nazis did what they did was because others allowed them to do it. They allowed them to do that because they did not want to be involved. And by the time they caught on that the situation was serious, their system no longer worked. They were in the hands of madmen. I'm not saying that this country is about to be taken over by Nazis. That would be madness. And I'm not saying I would compare anyone here to Hitler. That would be madness on my part, too, and unfair. I am using that as an illustration of what happens when you have a system and you don't use it for a good cause.

Let me read something else which is very disturbing. Let me read to you what a U.S. Ambassador said when he was asked this question by Congressman Fraser.

> "For those actions that you took, or propose to take in relation to human rights and related issues in El Salvador, what kind of support did you get out of Washington?" Mr. Losano: "Well, Mr. Chairman, little to none. We operated pretty much on our own in this area. The most important case to us involved the disappearance of an American citizen while in the custody of the Salvadoran authorities and we felt that we had great difficulty in getting Washington to focus on this particular case which we consider to be of extreme seriousness. I feel it did not get the attention that it deserved here until after we went public down there. I do not mean to imply by my answer that the concerns for human rights expressed by this administration are not sincere. But in the particular case of El Salvador being a small country as it is and given the fact that the U.S. really has no vital interest in the country, it is pretty difficult to get anybody to pay attention to us."

Let me tell you a little bit about this case because I was personally involved in it.

The man that disappeared was a man by the name of James Donald Richardson, a black man. Some told the embassy that this black man had been killed while in the hands of the Salvadoran authorities. Three of the people that talked were killed and fed to dogs. That's how serious some Salvadorans are about human rights. Black man, James Donald Richardson, killed in the hands of the Salvadoran authorities, 1976. We lost three Salvadorans because we wanted this conveyed to the U.S. Embassy. Look how serious Wshington was about human rights at the beginning of the Carter administration. The U.S. Ambassador, a Republican, a good man, is saying hell, we had Washington's attention. Our problem was for them to pay attention to us, not to do soemthing about it, to pay attention to us. Do you get my message? 1977. If somebody then would have paid attention, Carter, with his human rights policy, would have done something meaningful. And maybe he could have stopped the madness that we now have. Maybe Carter would have been in a position to make a difference. But somehow we had great difficulty in getting Washington to focus on this particular incident. Nothing could be done about it.

What do we have now? The blueprint for disaster. What are the issues? Many. Maybe another Vietnam. Maybe millions of refugees. Maybe your country getting involved in another war. Who knows? Look how these things begin. Look what one person in the right position who cares can do. I was asked to talk to you about refugees. I have talked about refugees. And about our situation, about what I think is important. I don't know how else to put it. Thank you.

Appendix

Program of the CMS Seventh Annual National Legal Conference on Immigration and Refugee Policy

Sponsored by:
The Center for Migration Studies of New York, Inc. at the Washington Hilton Hotel, Washington, D.C.
March 29 and 30th, 1984

PROGRAM

Thursday, March 29

8:00 a.m.	**Registration**
8:45	**Welcome** **LYDIO F. TOMASI,** Executive Director, Center for Migration Studies
9:00	IMMIGRATION LEGISLATION REFORM: A PANEL
Chair:	**CHARLES B. KEELY,** Center for Policy Studies, The Population Council, New York
Topics:	1. Legalization: Dates, Numbers, Costs, Procedures 2. Sanctions and Their Implementation 3. Foreign Agricultural Workers
Invited Panelists:	• Senator **ALAN K. SIMPSON,** Chairman, Judiciary Committee • Congressman **ROMANO MAZZOLI,** Chairman, Subcommittee on Immigration, Refugees and International Law • Senator **EDWARD R. ROYBAL,** Chairman, Hispanic Caucus • Congressman **ROBERT GARCIA,** D-NY
Comments:	**DALE FREDERICK SWARTZ,** President, National Forum on Immigration and Refugee Policy **RAUL YZAGUIRRE,** Director, National Council of La Raza, Washington, D.C. Rev. **FRANK O'LOUGHLIN,** Indiantown, Florida
11:15 a.m.	**Discussion**

If H.R. 1510 is enacted at the time of the Conference, the key provisions of the bill will be the focus of this session.

12:30 p.m. **Luncheon Program**

Presiding: **JOHN McCARTHY,** Director, Migration and Refugee Services, U.S.C.C., Washington, D.C. and President of I.C.M.C., Geneva

Invocation: Bishop **ANTHONY J. BEVILACQUA,** Chairman, NCCB Committee on Migration

Speaker: **Leonel Gomez,** Former Deputy Director, Agrarian Reform Program, El Salvador "National Interest and Implications for U.S. Foreign Relations in the Politics of Immigration Reform"

2:00 p.m. IMMIGRATION LEGISLATION PRACTICE

Chair: **AUSTIN T. FRAGOMEN, JR.,** Professor of Immigration Law, New York University, and Practicing Attorney, New York

Panelists: • The Civil Rights of Undocumented Immigrant Workers Under International Law
—**PETER A. SCHEY,** Executive Director, National Center for Immigrant Rights, Los Angeles

• The Fourth Amendment and Immigrant Rights
—**WADE J. HENDERSON,** American Council, American Civil Liberties Union, Washington, D.C.

• New Ground for Undocumented Aliens Plowed by the Courts
—**MAURICE ROBERTS,** Editor, Interpreter Releases

• Extended Detention and Detention Facilities: Legal Counsel and Representation; Detention of Minors and Women; Bonds Determination; Revised Policy of Detaining Aliens
—**AUSTIN T. FRAGOMEN, JR.**

Enforcing the Immigration Law: Now and After the Simpson-Mazzoli Bill
—**EDWIN HARWOOD,** Visiting Scholar, Hoover Institution, Stanford, California

4:30 p.m. **Discussion**

5:30 p.m. **Reception**

Friday, March 30

9:00 a.m. REFUGEES: POLICY AND LEGAL DEVELOPMENTS

Chair: **DONALD G. HOHL,** Migration and Refugee Services, U.S.C.S., Washington, D.C.

Panelists: • Shifts in Refugee Programs: Overseas Assistance vs. Domestic Admission
—**JAMES PURCELL, Jr.,** Director for Refugee Programs, U.S. Department of State, Washington, D.C.

• The Need and Functions of an "Early Warning" Structure for Refugee Responses
—**LEON GORDENKER,** Center of International Studies, Princeton University

• Protection of Individuals in Armed Conflicts
—**G. COLES, Sr.,** Legal Advisor and Chief, Conference and Treaties Section, UNHCR, Geneva

Comments: **DENNIS GALLAGHER,** Director, Refugee Policy Group, Washington, D.C.

ARTHUR C. HELTON, Director of the Political Asylum Project of the Lawyers Committee for International Human Rights, New York

---

11:00 a.m. POLITICAL ASYLUM IN PRINCIPLE AND PRACTICE IN THE U.S. AND OTHER INDUSTRIALIZED COUNTRIES:

Panelists: Responses to Aliens Seeking Temporary Safe Haven: The Movement and the Churches vs. Asylum Decisions and Procedures:

—**DAVID BROOKS ARNOLD,** Center for the Study of Human Rights, Columbia University

U.S. Refugee Policy and Recent Court Cases
—**DEBORAH ANKER,** International Institute of Boston

Refugee Act Reauthorization, Contending and Changing Benefit Philosophies for Refugees and the Effects of U.S. Government Domestic Expenditures on Refugee Programs
—**PHILLIP HAWKES,** Director, Office of Refugee Resettlement, Department of Health and Human Services, Washington, D.C.

Comments: **DALE S. DE HAAN,** Director, Immigration and Refugee Program, Church World Service, U.S.A.

DIANA L. ZANETTI, Assistant Commissioner, Asylum, Refugees, Parole, Interdiction and Overseas Offices, Immigration and Naturalization Service, Washington, D.C.

W. SCOTT BURKE, Deputy General Counsel, U.S. Department of Agriculture, Washington, D.C.

12:30 p.m. **Discussion**

Index

Abrams, Elliott, 138*n*
Afghanistan (Afghans), 64, 77, 90
Africa (Africans), 64, 67, 80, 81, 82, 86*n*
African Refugees and the Law, 98*n*
Aga Khan, Sadruddin, 70, 76, 102*n*
Agency for International Development (AID), 130
Agricultural Workers Protection Act, 28
Algeria (Algerians), 80, 81
"Alienation — American Attitudes Towards Immigration", 55*n*
The Amelioration of the Wounded and Sick in Armed Forces in the Field, 130*n*, 131*n*
American Bar Association, 10
American Declaration of the Rights and Duties of Man, 37, 38
The American University Law Review, 92*n*
Americas Watch Committee, 125
Angola (Angolans), 81
Anker, Deborah, 44
Annales de Droit International Medical, 101*n*
Archdiocese of Miami, 22*n*
Archdiocese of San Salvador, 126
Arevalo, Luis Alonso Amaya, 126
Arizona, 140
Arnson, Cynthia, 125*n*
"Arrests Without Warrant: The Legal and Organizational Environment of Immigration Law Enforcement", 52*n*
Asia (Asians), 15, 82, 86*n*
Assembly of Heads of State and Government of the Organization of African Unity, 78
Asylum, 7, 9, 10, 13, 37, 42, 45, 66
"Asylum and the International Protection of Refugees in Latin America", 97
Australia (Australians), 65, 96
Australian Yearbook of International Law, 96*n*, 103*n*
Avila, Joaquin, 15*n*

Background Paper for the Asian Working Group on the International Protection of Refugees and Displaced Persons, 94*n*
Barcelona Traction Case, 92
Bardach, Eugene, 58
"Basta: Sanctuary Organizers' Nuts and Bolts Supplement", 137*n*
Bellamy, John, 134*n*
Bernal v. Fainter, 43
Bethania Camp, 127
Bevilacqua, Anthony, 136
"The Biblical Conception of Asylum", 133*n*
Board of Immigration Appeals, 3, 39, 39*n*, 40, 41, 42, 44, 45
Bogota, Columbia, 37
Border Patrol, 27, 54
Boston University, 132
Botswanna, 81
Bowling Green, 24
Brooklyn, N.Y., 136
Brooklyn Law School, 46
Brooks, David Arnold, 143*n*
Bureau of Alcohol, Tobacco and Firearms, 58
Bureau of Humanitarian Affairs, 126
Bureau of Human Rights, 126
Burton, Nan, 125*n*
Burundi (Burundians), 81
Bustamante, J., 27

Cabell v. Chavez-Salido, 43
California, 22, 25, 51*n*
Cambodia (Cambodian), 124
Canada (Canadians), 10, 65, 115, 140
Canada Law Reports, 94*n*
Caribbean, 15, 17
Caritas, 126
Carolinas, 24, 29
Carter, James, 155
Castren v. The King, 94*n*
Castro, F., 63
Catholic Bishops' Committee on Migration, 136
Catholic Relief Services, 126
Catholic Standard, 136, 136*n*
Center for International Studies, 68*n*, 143*n*
Center for the Study of Human Rights, 140*n*
Central America (Central American), 15, 64, 82, 124, 132, 137, 138, 141, 142
"Central American Refugees: The Search for Appropriate Responses, 132*n*
Chadwick, Owen, 134*n*
Chavez, Cesar, 28
China (Chinese), 81
Christianity and Crisis, 136, 137*n*
Church Sanctuary, 132-137
Church World Service, 137
Claros, Mario Humberto, 126

Cleveland Mission Team, 127
Cold War, 39
Coles, G.J.L., 90*n*,94*n*, 96*n*, 103*n*, 114*n*, 115*n*, 125
Columbia University, 140*n*
Comite Evangelico Salvadoreno de Ayuda y Desarrollo (CESAD), 126
Comprehensive Study in Nuclear Weapons, 82*n*
Conclusion of the Executive Committee on the Protection of Asylum-Seekers in Situations of Large Scale Influx of 1981, 104
Congo, 81
Congressional Record, 141*n*
Convention Governing the Specific Aspects of Refugee Problems in Africa, 78
CORAP, 148
Corfu Channel, 92
Council of Delegates, 106
Council of Europe, 72
Covenants on Human Rights, 70
Cox, John, 134*n*
Crime and Public Order in England in the Late Middle Ages, 134*n*
Cuba (Cubans), 15, 23, 36, 47, 63, 142, 148

Davis Law Review, 52*n*
Declaration on the Elimination of all Forms of Racial Discrimination, 34
Declaration on the Granting of Independence to Colonial Countries and Peoples, 34
de Coto, Dinora Rodriguez, 128
de Cuellar, Pérez, 85
"Deporting Salvadorans", 137*n*
Desarrollo de la Communidad (DIDECO), 126
Devil's Garden, 24
"Diluting Compassion", 138*n*
"Dirt Bag Syndrome", 22
Disaster Preparedness and the United Nations, 87*n*
Dodd, Christopher, 153
Douglas, H. Eugene, 132*n*, 138*n*
Durenberger, David, 142*n*

East Asia (East Asians), 65
Eastern Europe, 65
Economical and Social Council, 96
El Campo, 127
Eleanor Case, 93
Ellis Island, 47
El Salvador (Salvadorans, 13, 36, 125-131, 132, 136, 138, 140, 141, 142, 151-155
El Salvador's Other Victims: The War on the Displaced, 127
El Tiangue, 127
Emerson, Robert, 26
Employer Sanctions, 12, 16-19, 28
Employment Standards Administration, 58
"Enforcing the Immigration Law: A Review of the Options", 57
Environmental Protection Agency, 58
Ethiopia (Ethiopians), 64
Evans, Florida, 26

Fair Labor Standards Act, 25, 58
Farmers Home Administration, 25
Farm Labor Contractor Registration Act, 28
"Farmworker Needs-Agency Services", 26
Federal Bureau of Investigation (FBI), 53
Federal Republic of Germany, 155
Feliciano, Florentino P., 107*n*
Fernandez v. Smith, 47-48
Fe y Esperanza, 126
Fife, John, 137
Fifth Hague Convention, 108, 109
Fifth Meeting of the Consultation of Ministers of Foreign Affairs, 38
Flamenco, Ingeniero Armando, 124
Florida, 15, 22, 24, 25, 27, 29, 77, 148
Florida Non-Profit Housing, Inc. 22*n*
Florida Technological University, 26
Foley v. Connellie, 43
Food & Drug Administration (FDA), 58
Fort Pierce, 26
IVth Geneva Convention, 110
Fragomen, Austin,40
France (French), 65
Francis v. INS, 40
Franciscan Order, 127
Fried, Fragomen, Del Rey, Bernsen and O'Rourke, 46*n*
"Fundamental Rules of International Humanitarian Law, Applicable in Armed Conflicts", 101*n*, 112*n*
Funes, Roxana Guadelupe, 128
Fuviera, Raul, 153

Garcia, Ramon Grande, 128
Gaza Strip, 105
Geneva Convention, 70, 121, 130
Germany (Germans), 154
Going By the Book, 58
Golden, Reny, 137*n*
Graham v. Richardson, 43

Grahl-Madsen, A., 79*n*, 83*n*
Great Britain, 94
Great Depression, 16, 28
Greenberg, Moshe, 133*n*
Guatemala (Guatemalans), 36, 132, 140
Guinea-Bissau, 81
Gulf of Thailand, 66

Haig, A., 142
Haiti, (Haitians), 15, 44, 47-48, 77, 148, 150
Haitian Migrant Interdiction Operation, 148
Handbook on Procedures and Criteria for Determining Refugee Status, 79*n*
Hartling, Poul, 102, 104
Harwood, Edwin, 52*n*, 55*n*
Hawkins, 8
Helsinki Declaration, 70
Henderson, Wade, 43
Hernandez, Antonia, 15*n*
Hesburgh Select Commission on Immigration and Refugee Policy, 57-58
Hill v. INS, 44
Hindus, 89
Hitler, A., 154
Honduras (Hondurans), 36, 139, 140
Hong Kong, 81
"Hong Kong as a Country of Temporary Refuge", 96*n*
Hoover Institution, 51*n*
Horgan, James, 26
Horn of Africa, 63
House Judiciary Committee, 25
Huerta, John E., 15*n*

Ibarra, Angel, 128
ICRC, 128
ILGWU v. Sureck, 43
Illegal Immigration and U.S. Foreign Policy, 17 n
Ilopango Prisons, 127
Immigration and Nationality Act, 51, 53, 54, 56, 145
Immigration and Naturalization Service, 5, 6, 18, 20, 39, 41, 43, 44, 46, 47, 48, 49, 51, 51*n*, 52, 54, 55, 56, 58, 59, 136, 140, 143, 145, 146, 147, 148
Immigration Reform and Control Act of 1984 3-7, 15-21
India (Indians), 89
Indiantown, 24
Indochina (Indo-Chinese), 15, 17, 146
Information on the Enforcement of Laws Regarding Employment of Aliens in Selected Countries, 16*n*
In re Griffiths, 43
"INS and the American Public: What Each Needs to Know About the Other", 55*n*
INS Reporter, 55*n*
INS v. Delgado, 43
INS v. Lopez-Mendoza, 43
INS v. Miranda, 41
INS v. Phinpathya, 41-42
INS v. Stevic, 42
INS v. Wang, 40-41
Institute of Humanitarian Law of San Remo, 96
Inter-American Caracas Convention on Territorial Asylum, 111, 113
Inter-American Charter of Social Guarantees, 37
Inter-American Commission on Human Rights, 87, 87*n*
Internally Displaced, 125-131
International Committee of the Red Cross, 64, 72, 101*n*, 110, 113*n*, 126, 127
International Conferences of the Red Cross, 106
International Conference on Assistance to Refugees in Africa, 64, 124
International Cooperation to Avert New Flows of Refugees, 86*n*
International Court of Justice, 92
International Covenant on Civil and Political Rights and Optional Protocol, 35-36
International Covenant on Economics, Social and Cultural Rights, 34-35
"International Humanitarian Law and Co-erced Movements of Peoples Across State Boundaries", 107*n*
International Institute of Humanitarian Law 88*n*, 90*n*, 114
International Labor Organization (ILO), 72, 106
International Law, 94*n*, 106*n*
International Law Commission, 92
The International Law of the Sea, 93*n*
International Protection of Human Rights, Contemporary Legal Education Series, 33*n*
The International Protection of Refugees and the Concept of Temporary Refuge, 96*n*

"International Protection of Refugees in Armed Conflicts", 101*n*
International Red Cross Aid to Refugees, 106*n*
International Refugee Organization, Constitution of, 93, 102
International Voluntary Services, 125*n*
Interpreter Releases, 3, 39*n*
"Interrelationships in the Implementation and Enforcement of International Humanitarian Law and Human Rights Law", 92*n*
Israel (Israelis), 90

Jamaica (Jamaicans), 150
Jean v. Nelson, 44, 45*n*, 47
Johnson, Lyndon B., 143
Jordan (Jordanians), 105
Journal of Biblical Literature, 133*n*

Kagan, Robert, 58
KGB, 153
Kampuchea (Kampucheans), 84, 90, 103, 146
Kentucky, 3

La Libertad, 127
Laos (Laotians), 103, 146
"Large-Scale Migrations of Asylum-Seekers", 96*n*
Latin America (Latin Americqans), 15, 17, 64, 67, 70, 86*n*, (*See also*, Central America)
The Law of Territorial Waters and Maritime Jurisdiction, 94*n*
Lawyers Committee for International Human Rights, 125, 125*n*
League of Red Cross Societies, 72, 101*n*, 105, 113*n*
Lebanon (Lebanese), 66, 105
Le Droit des Conflits Armes, 106*n*
Legalization, 5, 10-11, 19-20
Lindsay, Robert, 25
London Sunday Times, 82
Longstav v. INS, 44
Lopez-Mendoza, 44
Los Angeles, CA, 17*n*
Los Angeles Times, 17*n*
Lutheran Church, 126, 128

Mafia, 153
Maghrib, 80
Mariel Boat Lift, 148
Mariona Prisons, 127
Marshall, Ray, 26
Martin, P. 96*n*, 101*n*
Matter of Dumar, 42
Matter of Longstaff, 44
Matter of Sandoval, 44
May Case, 93
Mayo, Alberto, 17*n*
Mazzoli/ Panetta Temporary Workers Provisions/Amendments, 23, 25
Mazzoli, Roman L., 3, 4 ,15, 27
McConnell, Michael, 137*n*
Medecins du Monde, 127
Melander, U., 98*n*
Memoradun on Sanctuary, 136*n*
Mennonite Central Committee, 126
Mexican American Legal Defense and Educational Fund, 15*n*, 19
Mexican Customs, 52
"Mexican Undocumented: The International Law of Human Rights", 38*n*
Mexico, 10, 16, 27, 28, 29, 40, 42, 51, 52, 53, 54, 57, 94, 137
Mexico City, 36, 97
Mezei decision, 47-48
Miami, Florida, 13, 150
Miami Herald, 23
Miami Medical School, 22
Middle East, 63, 64, 67, 82, 124
Migrant and Seasonal Agricultural Worker Protection Act, 25
Migration Today, 38*n*
Miller amendment, 9
The Modern Law of Land Warfare, 106*n*
Mohn, Sid, 132
Moore Digest, 94*n*
Moore, Fowell A., 142*n*
Morris, Milton, 17*n*
Morocco (Moroccans), 80
Most Aliens Regain Jobs After Raids, 17*n*
Mt. Kisco, N.Y., 153
Mozambique (Mozambicans), 81, 85
Muslims, 89
M.V. Tun-An, 94

National Center for Immigrants' Rights, Inc., 33*n*
National Commission for Assistance to the Displaced (CONADES), 126, 127, 128, 130

National Commission for the Restoration of Areas (CONARA), 126, 128
National Forum on Immigration and Refugee Policy, 8*n*
National Labor Relations Act, 25
National Security Council Directive, 146
National Society, 105
National University of El Salvador, 126
Nazism (Nazis), 154
Neier, Arych, 125*n*
New York City, N.Y., 151
New York Times, *85*, *136n*, 138*n*, 142*n*
New York University School of Law, 46*n*
Ninth International Conference of American States, 37
Nordic Seminar, 102, 104
North, David, 57
North Shore University Hospital, 125*n*
"Note on International Protection", 65
Nunez v. Bolden, 48

Organization of African Unity (OAU), 78, 79, 98, 111, 120
OAU Convention, 80, 91, 96, 97, 104*n*, 107, 111, 113
Organization of American States (OAS), 36
Organization of American States, Constitutional Charter of, 37, 38
OAS Convention on Asylum, 37
OAS Convention Relative to the Rights of Aliens, 36
OAS Convention on the Status of Aliens, 36
Office of Legal Protection, 126
Ogaden War, 63
Ohio University, 143*n*
Okeechobee, Florida, 26
"On the Development of Peoples", 119
Omnibus Immigration Bill, 4
"Operation Cooperation", 18
Operation Everglades, 24
Operation Jobs, 17*n*, 18
Orange County, CA, 17*n*
"Orderly Departure Program", 67
OSHA, 26, 58, 59
"Our Brother's Keeper? Theories of Obligation in U.S. Refugee Policy", 139*n*

Pakistan (Pakistanians), 64, 89, 90, 124, 139
Palestine (Palestinians), 63-64, 90, 105
Palm Beach, Florida, 23
Palm Beach Post, 23
Panama (Panamanians), 94
Patrnogic, J., 101*n*
Penchaszadeh, Victor, 125*n*
Pepper, Senator, 8, 12
Philippines (Pilipinos), 94
Pickering, Thomas, 126
Pope Gregory XIV, 134
Pope Paul VI, 119
The Popes and the European Revolution, 134*n*
Portes, A., 27
Portugal (Portuguese), 81
Portuguese Guinea, 81
Princeton University, 68*n*
"The Problem of Mass Expulsion", 115*n*
Problems Arising from Large Numbers of Asylum-Seekers: A Study of Protective Aspects, 90*n*
Procedures and Criteria for Determining Refugee Status, 107*n*
Prohibition of Military and Armed Attacks on Refugee Camps and Settlements, 111
The Protest Movement and Vietnam Policy, *143n*
Public Opinion, 55*n*
Purcell, Jim, 122

"The Question of an International Approach to Resolving Security Problems in the Refugee Situation", 114*n*

Reagan, Ronald, 4, 154
Recession of 1981, 16
Red Cross, 138
Red Cross Movement, 105, 106
Reformation, 134
Refugees, 13, 15, 37, 63-67, 69-77, 78-121, 122-125, 137, 138, 142, 145-150, 151-155
Refugee Act of 1980, 137, 145, 146, 147
Refugee Bureau, 126
Refugee Coordinators Office, 126
The Refugees in International Law, 87*n*
Refugee Policy Group, 122*n*
Relative to the Protection of Civilian Persons in Time of War — Fourth Convention, 131*n*
Relative to the Treatment of Prisoners of War, 131*n*
Report to Congress: Proposed Refugee Admissions and Allocations for Fiscal Year 1983, *138n*

Report of the United Nations High Commissioner for Refugees, 102*n*
Report of the Working Group on Current Problems in the Protection of Refugees and Displaced Persons in Asia, 112*n*
Reservations to the Genocide Convention, 92
Richardson, James Donald, 155
Rittershusius, Georgius, 134*n*
Roberts, Maurice A., 3, 47
Rone, Jamera, 125*n*
Rosenberg v. Fleuti, 39-40
Roybal Bill, 10, 11
Roybal, Edward R., 3-7, 8
Ruanda (Ruandians), 81
Rural Life Bureau, 22*n*
Rusk, D., 143

Salvadoran Air Force, 128
Salvadoran Evangelical Committee of Assistance and Development, 126
Salvadoran Red Cross, 126
San Francisco Gotera, 127
San Jose de la Montana, 126
San Marcos, 127
San Remo, 114
San Rogue Church, 126
San Salvador, 126, 127, 130
The Sanctuaries and Sanctuary Seekers of Medieval England, 134*n*
Sanctuary, 140-144
(*See also*, Church Sanctuary)
"Sanctuary Advocates are Wrong", 138*n*
"Sanctuary: Choosing Sides", 137*n*
"Sanctuary: For the Birds", 136*n*
Santa Tecla, 126
Santiago, Chile, 38
San Vicente, 129
Save the Children, 126
Schnyder, Felix, 105, 110-111
School of Medicine of El Salvador, 126
Scranton, PA, 24
Second International Conference of American States, 36
Seeking Safe Haven, 137, 137*n*
Select Commission on Immigration and Refugee Policy, 4, 27, 29
Senegal (Senegalians), 81
Sepulveda, 92*n*
Sersenna, Det. Sgt., 153
Silber, John, 132
Simpson, Alan K., 3, 4, 15, 27
Simpson/Mazzoli Immigration Reform and Control Act, 8-14, 15, 23, 24, 29, 51, 56-62
Skadden, Arps, Slate, Meagher & Flom, 125*n*
Smith, William French, 4
Social Secretariat of the Archdiocese of San Salvador, 126
Somalia (Somalians), 90, 139
South Africa (South Africans), 64
South China Sea, 66
Southeast Asia, 64, 66, 67, 123, 138
Southside Presbyterian Church of Tucson, 140
Union of the Soviet Socialist Republic, 63, 65, 76
St. Leo's College, 26
Stammer, Larry, 17*n*
Status of the Refugees in International Law, 79*n*, 83*n*
Stevic v. Sava, 42
Strauss, Bob, 9
"Study on Human Rights and Mass Exodus: Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and Other Dependent Countries and Territories", 70*n*
Sugarman v. Dougall, 43
Supreme Court of Canada, 93
Sure-Tan, Inc. v. NLRB, 42
Switzerland (Swiss), 66
Syria (Syrians), 105

Tanzania (Tanzanians), 81
The Tarnished Golden Door, 70-73, 18*n*
"Temporary Refuge and the Large-Scale Influx of Refugees", 96*n*, 103*n*
Temporary Worker Programs, 9, 13, 19, 23-24, 28, 29
Texas, 43
Thailand (Thais) 66, 84, 90, 103, 124, 139
Third Committee, 36
Third Geneva Convention, 108
The Thirty Years War, 84*n*, 85*n*
Title VII, 18
Tunisia (Tunisians), 80

Uganda (Ugandans), 64, 81
Undocumented Immigrants, 17, 18, 19-20, 28, 40, 42, 43, 44, 54-62, 57, 58, 59, 88, 132, 136, 137, 138, 139, 148

United Church of Christ, 132
United Nations, 64, 81, 85, 86*n*, 106, 118
United Nations Covenant on Economic and Social Rights, 71
United Nations Convention on Refugees, 69, 70
United Nations Convention Relating to the Status of Refugees of 1951, 69, 70, 78, 80, 83, 91*n*, 97, 99, 101, 103, 107, 111, 113 117, 125*n*, 140-141, 142
United Nations Development Program (UNDP), 106
United Nations Disaster Relief Organization, 72, 75
United Nations General Assembly, 33, 34, 35 70, 72, 81, 83, 95, 96, 101, 102, 103
United Nations General Assembly Resolution 428, 70*n*
United Nations General Assembly Resolution 2200, 71*n*
United Nations Group of Experts on a Comprehensive Study on Nuclear Weapons, 118
United Nations Group of Governmental Experts on International Cooperation to Avert New Flows of Refugees, 89
United Nations High Commissioner for Humanitarian Affairs, 75-76
United Nations High Commissioner for Human Rights, 36, 76
United Nations High Commissioner for Refugees (UNHCR), 64, 65, 66, 67, 69*n*, 70, 72, 75-76, 78*n*, 79*n*, 80-81, 83, 96, 99, 101, 102, 104, 105, 106, 110, 116, 124, 138, 139, 141,
United Nations High Commissioner for Refugees (UNHCR), Handbook of, 107*n*
United Nations High Commissioner for Refugees (UNHCR), Programme of a Conclusion of, 95-96
United Nations High Commissioner for Refugees (UNHCR), Statute of, 78, 104
United Nations International Childrens Education Fund (UNICEF), 106
United Nations Relief and Works Agency for Palestinian Refugees in the Near East, 63, 64 84, 105, 139
United Nations Security Council, 72
United Nations, Charter of, 34, 107*n*, 119, 121
United States Agency for International Development (AID), 126
United States Catholic Conference, 3
United States Catholic Conference, Migration Refugee Services, 3*n*
United States Churches Offer Sanctuary to Aliens Facing Deportation", 136*n*
United States Civil Rights Commission, 18*n*
United States Coast Guard, 148, 150
United States Coordinator for Refugee Affairs, 132*n*, 137
United States Department of Justice, 39*n*, 51*n*, 54, 148
United States Department of Labor, 24, 58
United States Department of State, 65, 137, 148, 152, 154
United State's Department of Human Rights and Humanitarian Affairs, 147
United States Department of the Treasury, 58
United States Embassy, 130
United States General Accounting Office, 16
United States Mexican Claims Commission, 94
United States Supreme Court, 39, 40, 41, 44
Universal Declaration of Human Rights, 33-34, 38, 100, 142
University of California, 52*n*
University of Central America Jose Simeon Canas, 126
University of Florida, 26
University of Texas, 26
U.S.A. Today, 138*n*
Usulutan, 129

Valle, Victor M., 17*n*
Vargas v. Strake, 43
Vega, Marco Antonio Coto, 128
Vero Beach, 24
Vietnam, 66, 67, 77, 90, 94, 143, 146, 154, 155
Vietnam War, 135, 137
Virginia, 12
Voluntary Agencies, 72-73

Wadman v. INS, 40, 41
Washington, D.C., 122*n*
Washington Post, 12, 86, 137, 137*n*
Wedgewood, C.V., 84*n* 85*n*
West Africa, 85
Working Group on Pre-Flow Aspects of the Refugee Phenomenon, 88*n*

World Food Program, 64
World Refugee Survey, 132*n*, 139*n*
World War II, 68, 80, 83
Worldwide Guidelines for Overseas Refugee Processing, 146
Wyoming, 3
Yearbook of the International Institute of Humanitarian Law, 114*n*

Zaire (Zaireans), 81
Zambia (Zambians), 81
Zelada, Gustavo Adolfo, 128
Zimbabwe, (Zimbabweans), 85